Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

TERRY LUNDELL,

Petitioner,

vs.

DANIEL WATKINS and CYNTHIA WATKINS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

TERRY LUNDELL
8715 E. Eagle Creek Drive
Tucson, Arizona 85730
(520) 296-5486

Petitioner Pro Se

9DPP

QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals err by not setting aside Judgement rendered on Defendant while Defendant was actively involved in Military Service where no affidavit was filed by the Plaintiffs setting forth facts that the defendant was not in military service or in lieu thereof an affidavit setting forth either that the defendant is in the military service or that the plaintiff is not able to determine whether or not defendant is in such service as specified in the Soldiers' and Sailors' Relief Act 50 U.S.C. § 520(1).

Was the Defendant prejudiced by reason of his military service and did the Eighth Circuit Court err by not requiring the Defendant to file a bond conditioned approved by the court conditioned to indemnify the Defendant, who was in military service, against any loss or damage he may have suffered by reason of any judgement should the judgement be thereafter set aside in whole or in part as specified in the Sailors' Relief Act 50 U.S.C. § 520(1).

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PETITION FOR WRIT OF CERTIORARI

TERRY LUNDELL respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1) is not reported.

The opinions of the district court (App. 17, 19 and 45) are not reported.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

50 U.S.C. § 520(1) provides in pertinent part:

> In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file

> an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application make such appointment. Unless it appears that the defendant is not in such service the court may require, as a condition before judgment is entered, that the plaintiff file a bond approved by the court conditioned to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part. And the court may make such other and further order or enter such judgment as in its opinion may be necessary to protect the rights of the defendant under this Act (sections 501 to 593 of this Appendix).

50 U.S.C. § 520(1) (1993).

50 U.S.C. § 520(4) provides in pertinent part:

> If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after

> the termination of such service, be opened by the court rendering the same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof.

50 U.S.C. § 520(4) (1993).

STATEMENT OF THE CASE

Plaintiffs/Appellees are residents of San Jose, California. Defendants/Appellants are residents of Tucson, Arizona. Appellees and Appellants were parties to a civil action entitled *Daniel Watkins and Cynthia Watkins v. Terry Lundell and Stephanie Lundell,* Civil Action No. C92-20291, filed in the U.S. District Court, Northern District of California, San Jose Division, on May 19, 1992 (California Action) (App. at 1-13). In the California Action, Appellees sued Appellants for breach of contract and fraud in connection with a contract of sale of the A.C. Benton farm in Iowa by Appellants as sellers to Appellees as purchasers. (App. at 1-13). Appellants filed a counterclaim for breach of contract against Appellees in the California Action. (App. at 1-13). The California Action was dismissed with prejudice following a written settlement (Settlement) executed by both parties December 21, 1992 (App. at 6-13). The Settlement required that settlement funds would be payable to Daniel Watkins, Cynthia Watkins, and LaMarca and Landry, P.C. at the LaMarca and Landry, P.C. law office in West Des Moines. (App. at 9, paragraph 3(f)). LaMarca and Landry, P.C. also caused

themselves to be named beneficiaries under a life insurance policy that Terry Lundell was required to obtain and maintain in the unpaid amount of the Settlement. (App. at 11, paragraph 9).

A material provision of the Settlement required that George LaMarca of LaMarca and Landry, P.C. deliver a letter to Appellants' banker advising that the parties had fully settled all disputes in the California Action, that neither party admitted liability, and that the parties each wanted to buy their respective peace and security by final settlement of the matter. (App. at 11, paragraph 10). Paragraph 10 of the Settlement was not complied with by Appellees. Appellants were unable to perform the Settlement.

This action was filed July 9, 1993, in U.S. District Court Southern District of Iowa, Central Division, Civil Action No. 4-93-CV-10487 (App. at 1-13), on identical grounds averred in the California Action, including additional allegations that Appellants fraudulently induced Appellees to enter into the mediated Settlement of the California Action. Appellants did not initially appear in the present action.

On November 18, 1993, Appellees applied for default judgment against Appellants. (App. at 18-19). On November 23, 1993, the court entered an order finding Appellants in Default. (App. at 20). On November 23, 1993, Appellees' Motion for Default Judgment against Appellants was redocketed as a Motion for Judgment. (Clerk's Pleading Index Entry #4).

On December 2, 1993, U.S. District Judge Ronald E. Longstaff referred the case to U.S. Magistrate Mark W.

Bennett for recommendations. (Clerk's Pleading Index Entry #5). On December 15, 1993, Magistrate Bennett entered an Order directing that an evidentiary hearing be held on Appellees' Motion for Judgment on January 7, 1994 at 9:00 A.M. (Evidentiary Hearing) (App. at 141). Said order was stamped "Copy to Counsel" and initialed by the court. *Id.* Said order does not indicate that a copy was served or mailed to Appellants. *Id.* Appellants were without counsel at the time the order for the Evidentiary Hearing was entered.

On January 7, 1994, the Evidentiary Hearing was held in U.S. District Court pursuant to Magistrate Bennett's Order. Appellants did not appear in person or through counsel at the Evidentiary Hearing. The Evidentiary Hearing was reported before a Certified Shorthand Reporter. (App. at 21-38).

On January 11, 1994, Magistrate Bennett filed a Report and Recommendation Pursuant to 28 U.S.C. § 636(b)(1)(B) concerning the Motion for Judgment before Judge Longstaff (First Report). (App. at 39-49). On February 16, 1994, Judge Longstaff issued an order incorporating the First Report and entering Judgment in favor of Appellees against Appellants in the amount of $335,000.00 actual damages, interest at 5% per annum, and $3,500,000.00 punitive damages. (App. at 51-52).

On July 6, 1995, Appellants filed a Motion to Set Aside Default Judgment, for Bill of Review in Equity and for Relief under the Soldiers' and Sailors' Relief Act. (Combined Motion) (App. at 54-69). On April 21, 1997, U.S. Magistrate Ross Walters filed a report and recommendation to Judge Longstaff concerning the Combined

Motion (Second Report). (App. at 181-206). The Second Report recommended denial of Appellants' Combined Motion; reduction of the amount of actual damages in the Judgment in favor of Appellees against Appellants to $235,000.00 plus interest at 5% per annum; judgment against Appellant, Terry Lundell, for $3,500,000.00 punitive damages; and reduction of the punitive damages award against Appellant, Stephanie Lundell, to $117,500.00. (App. at 205). On July 11, 1997, Appellants filed timely objections to the Second Report. (App. at 207-08). On July 23, 1997, Judge Longstaff issued an order incorporating the Second Report in his Judgment. (App. at 209-11). On August 4, 1997, Appellants' filed a Motion to Amend Findings of Fact and Judgment and Brief in support thereof. On August 21, 1997, Appellees resisted Appellants' Motion to Amend Findings of Fact and Judgment although Appellants were not served with such resistance. On August 29, 1997, Judge Longstaff overruled Appellants' Motion to Amend Findings of Fact and Judgment. On September 25, 1997, Appellants filed Notice of Appeal before this Court.

REASONS FOR GRANTING THE PETITION

I. THE ISSUES IN APPELLANTS' BRIEF WERE TIMELY RAISED AND NOT WAIVED

A. Lundells' Motion to Amend Finding of Facts and Judgment pursuant to Rule 52(b) was timely filed.

The Watkinses argue that Lundells' Motion to Amend Findings of Fact and Judgment was somehow untimely

filed. (Appellees' Brief, pp. 7, 18, 24, 26, 29). They argue that these issues are before the court for the first time on appeal because they were first raised in Lundells' Motion to Amend Findings of Fact and Judgment filed August 4, 1996, more than 10 days after the entry of final judgment, are untimely and should be considered waived. *Id.* This argument misses the mark for several reasons.

The decision of the District Court on Lundells' Combined Motions was entered July 23, 1997. (App. pp. 209-11). Fed. R. Civ. P. 52(b) provides, in pertinent part: "On a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings – or make additional findings – and may amend the judgment accordingly." Fed. R. Civ. P. 52(b) (1997). *See also,* Fed. R. Civ. P. 59(e), Fed. R. Civ. P. 6(e), however, provides, in pertinent part: "Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period. Fed. R. Civ. P. 6(e) (1997). Without computing the three days, the tenth day after the District Court's Order on Lundells' Combined Motions fell on Saturday, August 2, 1997. Applying Rule 6(e) alone, Lundells' Motion was due August 5, 1997. Moreover, Fed. R. Civ. P. 6(a) provides, in pertinent part:

> In computing any period of time prescribed or allowed by these rules, . . . [t]he last day of the period so computed shall be so included, unless it is a Saturday, a Sunday, or a legal holiday, . . . in which event the period runs until the end of the next day which is not one of the

> aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

Fed. R. Civ. P. 6(a) (1997).

According to Rule 6(a), July 26, July 27, August 2, and August 3 were not to be included in the computation of time for Lundells to file their Motion to Amend Findings and Judgment under Rule 52(b). According to Rule 6(e), July 24, July 25, and July 26 were not to be included in the computation of time for Lundells to file their Motion to Amend Findings and Judgment under Rule 52(b). Applying Rules 6(a) and 6(e) together, Lundells' Motion to Amend Findings and Judgment was due Friday, August 8, 1997. Lundells' Motion to Amend Finding of Facts and Judgment was in fact filed Monday, August 4, 1997, in a timely manner as permitted by the foregoing rules.

B. Lundells' Motion to Amend Finding of Facts and Judgment preserved error on the issues raised.

The issues raised in Lundells' Motion to Amend Finding of Facts and Judgment are not being raised for the first time for purposes of this appeal. Lundells were not required to raise all the issues in their Appeal Brief prior to filing their Motion to Amend Finding of Facts and Judgment in order to preserve error. Fed. R. Civ. P. 52(b) states:

> When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may be later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.

Fed. R. Civ. P. 52(b) (1997).

The instant case in which a default judgment was granted and an evidentiary hearing held before the District Court was certainly not one tried by a jury. Accordingly, Lundells are not precluded from raising the issues raised in the Arguments in his Appeal Brief and the Court must consider these issues as properly raised in this Appeal.

II. LUNDELLS IN FAIRNESS SHOULD HAVE BEEN GIVEN NOTICE OF THE ORDER FOR EVIDENTIARY HEARING ON WATKINSES' MOTION FOR JUDGMENT

The Watkinses argue that Lundells were not entitled to notice of the evidentiary hearing held on January 7, 1994, that a party in default who knowingly and deliberately refuses to defend an action is not entitled to notice of a subsequent hearing. This argument ignores an important irregularity in the proceeding and the purpose of Fed. R. Civ. Rule 55. On December 15, 1993, Magistrate Bennett entered an Order for an evidentiary hearing on Watkinses' Motion for Judgment on January 7, 1994 at 9:00 A.M. (Clerk's Pleading Index Entry #7). The order was stamped "Copy to Counsel" and initialed presumably by court personnel. *Id.* The order did not make a

reference to a copy being served or mailed to Lundells. *Id.* Although Lundells had not appeared, the Court entered its order as if they had, through counsel, believing Lundells would be notified of the hearing through counsel. As Lundells were believed to have counsel at the time the Order was entered, however, notice was not mailed to them and they had no notice of the hearing. It is unknown whether anyone other than Watkinses' counsel received a copy of the Order for hearing as indicated by the Clerk's stamp. This irregularity should be resolved in favor of Lundells in order to insure provision of the minimum level of procedural and substantive due process to which Lundells were entitled.

Some state courts have amended local civil procedural rules to require that before default may be taken, the non-appearing defendant must be given notice that he is in default and that default judgment may be entered if the defendant does not rectify the default within 10 days of such notice. See, e.g., Iowa R. Civ. P. 230 (as amended, January 2, 1998). This change could only have been made to avoid offending our notion of fair play and substantial justice required by the Fifth and Fourteenth Amendments to the Constitution. Although Fed. R. Civ. P. 55 has not been so amended, the District Courts must not overlook their duty to establish the evidence in Fed. R. 55(b)(2) (1997) for it is the same notion of fair play and substantial justice that is served thereby.

III. THE SOLDIERS' AND SAILORS' RELIEF ACT APPLIED TO TERRY LUNDELL AND HE WAS PREJUDICED BY HIS MILITARY SERVICE

The Soldiers' and Sailors' Relief Act, 50 U.S.C. § 520(1) (1993), was intended solely for the benefit of those in the armed services of the United States, and is to be liberally construed to effectuate its purpose. *Oliver v. Oliver,* 12 So.2d 852, 244 Ala. 234 (1943). The Watkinses first improperly contend that the Act does not apply to military personnel performing reserve duty, citing *Markowitz v. Carpenter,* 211 P.2d 617, 619 (Cal. Dist. Ct. App. 1949) (naval reservist not entitled to protection of the Act) and *Cornell Leasing Corp. v. Hemmingway,* 553 N.Y.S.2d 285, 287 (Civ. Ct. 1990) (dicta suggesting a reservist is not protected by the Act). *Markowitz* is factually and legally inapposite because its holding is limited to there being no authority that a person in an *inactive* military status can claim the benefits of the Act, in a case further supported by testimony that the defendant was in Los Angeles (the situs of the trial) at the time of the trial. *Markowitz* at 619. (Emphasis added). *Cornell* is factually and legally inapposite because it concerned a show cause action for nonpayment of rent in which the decision denying relief was rendered on the basis that the defendant did not show prejudice because of his military service *due to the proximity of his assignment to his home in this country. Cornell* at 286-87. (Emphasis added). The question of Cornell's reserve status was neither reached nor discussed and there is simply no suggestion in the dicta or otherwise that active reserve status disqualifies one from protection under the Act. It is undisputed in this case that Terry Lundell was on active Air Force Reserve duty pilot status

between August 28, 1993 and February 16, 1994. (App. at 192, 24, 159-60, 161, 169, 179).

The district court improperly concluded the Soldiers' and Sailors' Civil Relief Act did not apply to Terry Lundell because he failed to show he was prejudiced as a result of his military service. (App. at 29-30, 192-96). Specifically, the district court denied Terry Lundell's request for relief under the Act ostensibly because he allegedly failed to establish that his defense was prejudiced by his limited military service. (App. at 195-96). But the Act was arguably intended to prevent judgment by default against a person in military service who did not have adequate time or opportunity to appear and defend or otherwise protect his right. *See, Burgess v. Burgess*, 234 N.Y.S.2d 87, 89 (Sup. Ct. 1962). Between August 28, 1993 and November 23, 1993, Terry Lundell was engaged in some type of military activity on 36 days. (App. at 192, 24, 159-60, 161, 169, 179). Between November 23, 1993, and February 16, 1994, Terry Lundell was engaged in official duty with the Military on 33 days. *Id.* Terry Lundell clearly did not have this time or opportunity due to the chronicity of his active military service.

IV. THE DISTRICT COURT IN IOWA SHOULD NOT HAVE FOUND AS TRUE AND ADOPTED OPERATIVE FACTS OF THE COMPLAINT IN THE CALIFORNIA ACTION

The district court exceeded its authority and abused its discretion by adopting the operative facts alleged in the California complaint without requiring independent proof of damages. The Watkinses argue that the operative

facts set forth in the California complaint provide relevant background information about the parties and their prior course of dealing. While it is well recognized that when a defendant is in default, a court may accept as true the well-pleaded allegations in a plaintiff's complaint, *Black v. Lane,* 22 F.3d 1395, 1399 (7th Cir. 1994), it is equally recognized that in default cases, the court may seek or require additional proof to establish liability or damages. *Au Bon Pain Corp. v. Artect, Inc.,* 653 F.2d 61, 65 (2d Cir. 1981). A diligent search for the truth requires that the court require credible and weighty evidence to establish the proof of the plaintiff's factual and legal claims and discard that which is merely self serving and uncorroborated, such as the testimony of Daniel Watkins at the January 7, 1994 hearing on damages. Moreover, where the pleading alleges a duty not cognizable under law, such as one to disclose to the Watkinses that the Lundells had just purchased the property for $6,000,000.00 despite the fact that they knew that arranging $5,600,000.00 of initial financing would be impossible once lenders learned the property had recently sold for $6,000,000.00, adoption of such an allegation becomes error and may not stand.

V. WATKINSES COULD NOT ESTABLISH A RIGHT TO RELIEF FOR BREACH OF THE SETTLEMENT IN THE CALIFORNIA ACTION BECAUSE THEY WERE IN BREACH OF IT AND NOT LEGALLY EXCUSED FROM PERFORMANCE

Although Lundells first raised the defense at the evidentiary hearing on their Combined Motions (Hearing Transcript Dec. 16, 1996 at 173-75), the defense was not waived because the court in consideration of the merits of

Lundells' Combined Motions proceeded to hear the defense and give it due consideration in the Report and Recommendations. Moreover, the letter provision in paragraph 10 was as material to the settlement agreement as any other term and thereby a condition precedent to the Lundells' performance under the contract. (App. pp. 3-10) The Lundell's obligations under the settlement agreement were as conditioned on the Watkinses' attorney preparing and delivering a letter to Lundell's Iowa banker as any other material provision of the settlement agreement. Perhaps the Watkinses confuse the term 'material' with the term 'essential.' The provision was negotiated in the mediation of the California action, included in the settlement agreement for a particular reason and must be given its plain, intended, unambiguous meaning. It was not surplusage. The language of the settlement agreement speaks for itself. Delivery of the settlement payments required under the settlement agreement were likewise as conditioned on the letter being sent to Lundell's banker as any other material provision of the settlement agreement. The Watkinses failure to provide the letter was a material breach from which the Watkinses have shown no legal excuse.

The Watkinses claim further that Terry Lundell never provided the Watkinses' attorney with information necessary to prepare and send the letter to his banker. In this case, Watkinses' attorney, George LaMarca, testified that he did not send a letter to Lundell's banker because Terry Lundell never provided him with the name and address of his Iowa banker (Hearing Transcript Dec. 16, 1996 at 174-75), because LaMarca did not know the exact content or language to use in the letter, (*id.* at 174), and because

according to Lundell the letter had to have certain language in it to satisfy the banker that Lundell was supposed to provide to LaMarca via a specimen that Lundell never sent. *Id.* This testimony fails to corroborate the Watkinses alleged excuse for the breach because their attorney was put in the position of having to argue his own veracity together with that of the Watkinses on a material matter relating to an affirmative defense, a highly discouraged practice which in the present case should be given no weight.

VI. THE WATKINSES CLAIMS ARE *RES JUDICATA* IN THE PRESENT ACTION

The doctrine of *res judicata* applies to the present case because the claims and issues in this case are virtually identical to the claims and issues raised in the underlying California case. The California case involved claims of fraud and breach of contract in connection with the sale of real estate in Iowa. The present case involves claims of fraud and breach of contract in connection with a settlement agreement resolving the same claims and issues of fraud and breach of contract in connection with the sale of real estate in Iowa. The claims and issues raised in the two cases are hardly separate or distinct. The parties were identical. The underlying merits were identical. Except for the addition of a settlement of the underlying claims, there was a full and fair opportunity to litigate the underlying issues. The evidence necessary to establish the underlying claims was the same. Establishment of the settlement agreement claims through trial would require

trial of the underlying claims. The differences between the two cases are thinly veiled at best. Consequently, the doctrine does apply.

VII. THERE IS INSUFFICIENT EVIDENCE THAT LUNDELLS FRAUDULENTLY INDUCED WATKINSES TO ENTER INTO THE SETTLEMENT IN THE CALIFORNIA ACTION

The Watkinses argue that they presented the district court with more than sufficient evidence to establish each and every element including witness testimony and exhibits at the evidentiary hearing on January 7, 1994. They claim without authority a litany of mere allegations that the Lundells made numerous fraudulent misrepresentations in their course of dealings with the Watkinses, that in May 1990 Terry Lundell fraudulently induced Daniel Watkins to enter into a contract for the sale of property in Iowa even though he never had clear title to the property, that as a result of Terry Lundell's misrepresentations Daniel Watkins lost the benefit of his bargain and his down payment valued at $200,000 together with $33,000 in loan origination and appraisal fees, that in 1992 Terry Lundell and his wife fraudulently induced both Daniel and Cynthia Watkins to enter into a settlement agreement to dismiss their California lawsuit, that the Lundells falsely promised to pay $235,000 and pledged an insurance policy and mortgages as security, that the Lundells never intended to honor that settlement agreement, that the settlement payments were never paid, that the insurance policy was never procured, that the mortgages were worthless, that as a result the Watkinses forfeited their claims in California and never

recovered the $235,000 promised under the settlement agreement. Watkinses claim further that the mortgages on the Colorado and Utah properties originally represented as sufficient security for the Lundells' obligations were in fact highly encumbered, there being no equity in those properties. (App. at 3, 30, 46, 184).

In his position, Daniel Watkins, or any plaintiff for that matter, in order to recover, could say just about anything without contradiction when the defendant is not present and the court is well experienced to take note and suspicion over the audacity of the allegations during prove-up. For instance, the court should out of a reasonable caution for determining the truth, consider requiring such evidence as documents or independent testimony to establish claims of sizable net worth, income from farming operations, size of operation, appraisal of land and the extent of encumbrances thereon. In common usage in business transactions, these matters are not ordinarily given credibility solely by word of mouth. Contrarily, due diligence is the common modern rule exercised by astute investors. The evidence of fraudulent inducement must fail for the reason that it is one-sided and lacks the kind of corroboration expected to clearly, sufficiently and convincingly prove it.

VIII. WATKINSES AS SOPHISTICATED INVESTORS WERE NOT ENTITLED TO REASONABLY RELY ON LUNDELLS' REPRESENTATIONS IN THE UNDERLYING TRANSACTION

The Watkinses argue that this claim is misdirected and not relevant to the present lawsuit because it does

not involve a claim of fraud based on misrepresentations concerning the sale of the Iowa property raised in the California lawsuit, that the present lawsuit alleges fraud based on misrepresentations made to induce a settlement and dismissal of the California lawsuit. Again, the difference is thinly guised at best. But the obviously high level of sophistication of the Watkinses, as investors, goes to the heart of the element of reasonable reliance on any statements made to them by Terry Lundell. Simply put, the bigger the transaction, the more diligence that ought to in common sense be done by the one seeking the bargain. Daniel Watkins was seeking a bargain, a 5380-acre farm he was willing to pay 7.8 million dollars for. (App. p. 22). This was a huge transaction; of the type unsophisticated investors cannot or should not contemplate. More sophisticated yet because it involved the nuances, risks and pitfalls inherent in purchasing income producing farm property, and especially to Daniel Watkins purchasing from a foreign state nearly 2000 miles away, using a $200,000 Ferrari as a down payment. The question arises again: just what could Daniel Watkins reasonably rely on in this kind of a 'big deal'? Certainly he could not reasonably rely on the words of a stranger.

The Watkinses note in their Brief that sometime prior to the closing, Terry Lundell failed to perform under the Benton contract and forfeited his right to the property, (App. at 24-25, 42, 182), that as a result, Terry Lundell was unable to transfer the Iowa property to Watkins, (App. at 27, 42, 182), that despite repeated demands, Lundell refused to return Watkins' down payment. (App. at 42). This argument ignores that Watkinses were also unable to close on the farm purchase because they could

not get financing to support their bid and consequently, reliance on Terry Lundell's representations, whatever they really were, would not have gone to his detriment as he would fail to close for reasons independent of Terry or Stephanie Lundell.

IX. THE JUDGMENT IN THIS CASE IS NOT *RES JUDICATA* IN A SUBSEQUENT PROCEEDING COMMENCED UNDER 11 U.S.C. § 523(a)

Where a Bankruptcy Court in Iowa previously ruled that a state court fraud judgment would be *res judicata* in the bankruptcy court, the District Court reversed the granting of the creditor's motion for summary judgment because the state court judgment was procured by default and there existed a fact issue that debtor was given an opportunity to defend against the default. *In re Burnett,* Adv. L-88-0245W (Bankr. N.D. Iowa 8/16/90) (state court found fraud awarding creditor $149,000 actual damages and $100,000 punitive damages). This distinction is important in this case, which also involves a default judgment for fraud where punitive damages were awarded. 11 U.S.C. § 523(a) determination made in the Report and Recommendations would therefore not be *res judicata* in the bankruptcy court. The Watkinses cite no authority in this circuit to the contrary.

X. WATKINSES WERE NOT ENTITLED TO AN AWARD OF PUNITIVE DAMAGES

A. Application of Iowa Law or California Law.

The law on punitive damages is not substantially similar in Iowa and California. *See generally,* Cal. Civ. Code § 3294 (1997); Iowa Code Ch. 668A (1997). Under California law, a plaintiff is entitled to punitive damages when "it is proven by clear and convincing evidence that the defendant has been guilty of oppression, *fraud,* or malice." Cal. Civ. Code § 3294(a) (emphasis added); *see also, Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1105 (9th Cir. 1992), *cert. denied,* 506 U.S. 1080, 113 S. Ct. 1047, 122 L. Ed.2d 355 (1993). While the instant record clearly and obviously falls short of establishing 'malice' or 'oppression' as defined in § 3294, it likewise fails to establish 'fraud' under the California definition because no clear and convincing evidence that misrepresentations made by Lundells, if any, were intentional, were adduced in the January 7, 1994 hearing. (App. at 22-30).

Under Iowa law, a plaintiff is entitled to punitive damages when it is proven "by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another." Iowa Code § 668A.1(1)(a) (1997). The fact that both states test the reasonableness of the award in a similar fashion as noted by the Watkinses, however, does not homogenize the underlying substantive elements of proof of entitlement to punitive damages in the first instance. Given

these substantive distinctions, erroneously applying California's civil code statute could hardly be deemed harmless.

B. Evidence Concerning the Net Worth of the Lundells.

The district court erred in receiving and giving weight to the evidence concerning the Lundells' alleged net worth of approximately $11,000,000 at the evidentiary hearing January 7, 1994. (App. at 30-34). A prima facie showing of fraud was not established solely through the testimony of Daniel Watkins, and certainly not by virtue of the Lundells' default. Under Iowa Code Chapter 668A, evidence concerning the Lundells' net worth was relevant to determine an appropriate award of punitive damages only if the Watkinses could first make a prima facie showing of a right to relief. Iowa Code § 668A.1(3) (1997); *see, Pulla v. Amoco Oil Co.*, 72 F.3d 648, 659 (8th Cir. 1995); *Boyle v. Lorimar Prods., Inc.*, 13 F.3d 1357, 1359-60 (9th Cir. 1994). Watkins claim that the Lundells should be estopped from arguing that Daniel Watkins' testimony concerning the Lundells' net worth was self-serving and lacking in credibility. During discovery, the Watkinses repeatedly requested the Lundells to produce their tax records, financial statements, credit applications, and other documentary evidence to confirm their net worth. Although Terry Lundell ultimately refused to produce these records and was sanctioned, (Order entered January 2, 1996; Ruling on Plaintiffs' Motion for Additional Sanctions entered May 20, 1996), such failure makes Daniel Watkins testimony about Terry Lundell's net worth no

more or less likely than without the testimony. The district court should have required more than Daniel Watkins' purely self-serving testimony to establish Terry Lundells' net worth and in the absence thereof, the district court should not have awarded punitive damages.

Only according to Daniel Watkins has Terry Lundell represented that he is worth $11,000,000 (App. at 30-31). Only according to Daniel Watkins was Terry Lundell's contract harvesting business was generating $120,000 to $150,000 in income at the time he was attempting to sell the Iowa property to Watkins. Only according to Daniel Watkins was Terry Lundell receiving income from his 5,000 wheat acres in Colorado, his farm in Oklahoma, his four-county project in New Mexico, and his operations in Merical County, California (App. at 30-31). The fact that neither the Watkinses nor the district court had the opportunity to examine the Lundells' tax records, financial statements, credit applications, or other documentary evidence to confirm the Lundells' net worth does not confirm the Lundells' net worth in any particular amount.

C. Due Process.

The Watkins claim that the punitive damage award of $3,500,000 against Terry Lundell was not unreasonable when viewed in light of the nature of the egregious conduct, the damages they caused, and their overall net worth. *See Pulla v. Amoco Oil Co.*, 72 F.3d at 659; *Boyle v. Lorimar Prods. Inc.*, 13 F.3d at 1359-60. To buttress this argument, the Watkins urge the same litany of unproved, mere allegations asserted in their fraudulent inducement

claim. (Watkins' Brief, pp. 24-26). The conservative eye might more appropriately opine, upon viewing the lack of quality, independent evidence presented in the January 7, 1994 hearing, that the Lundells' conduct was at worst, non-performing or negligent, that the damages caused are ill-proven, overstated and unmitigated, and that the Lundells' net worth was a guess at best, by a person with a direct financial interest in getting a piece of whatever it might be. The cases previously cited, however, make it clear that excessive punitive damage awards deny substantive due process and will be remitted when so shown; that the majority of punitive damage cases upheld show conduct far more reprehensible than that of the Lundells, most applying a more careful and focused methodology of determining net worth and in the end applying a smaller multiplier of the actual damage award to punish the conduct of the defendant.

Daniel Watkins stands to hold a seven-figure judgment from his testimony about Terry Lundell's alleged net worth. (App. at 25, 29-34). The incredulity of his claim is in his testimony. Daniel Watkins testified "His wife is a medical doctor. She makes a lot of money. He is a contract harvester as well as a very huge operator. He *probably* grosses 200-300 thousand dollars a year just himself. He's got 11 million net worth, and he's ignoring me. He's mocking the whole system here. He's mocking the settlement agreement. He's mocking us today." (App. at 34). (Emphasis Added). There is no real, believable proof of the Lundells net worth in these statements and what reasonable person would believe them without more.

Daniel Watkins' testimony was uncorroborated braggadocio given for his benefit alone. It should have been given no weight.

Numerous cases establish limits on punitive damages awards. *See, Pacific Mutual Life Ins. Co. v. Haslip,* 499 U.S. 1, 9-15, 23-24 (1991) (insurance fraud case involving premiums purloined by agent – $840,000 punitive damages award more than four times actual damages "may be close to the line"); *Schmizza v. Illinois Farmers Insurance Company,* 928 F. Supp. 760 (N.D. Ind. 1996) (punitive award of $600,000.00 found excessive where actual damages were $45,000.00 and farmer's conduct did not rank high on reprehensibility scale). In *Haslip,* although multiple acts of malfeasance against insureds and an insurance company were found, a punitive damage award of more than four times actual damages was thought "close to the line." Accordingly, a punitive damage award nearly 15 times purported actuals in a breach of a settlement regarding a single land contract is patently excessive. The requisite underlying reprehensibility of conduct of Lundells or harm to Watkinses was not shown and the nature and quality of the evidence of net worth of the Lundells embarrassingly inadequate.

In the Second Report, the court had problems with the amount of punitive damages awarded. It stated: "As to the final guidepost, it is difficult to compare the punitive damages award here with sanctions for comparable misconduct. No supportive analogue comes to mind for a bad faith failure by an individual to pay money due by contract." (App. at 201). The 3.5 million-dollar punitive damage award was not due to extreme reprehensible conduct against Watkins with equal harm to them. It was

a sanction for not producing income tax records in the Combined Motion proceeding.

In the Second Report, the court stated: "There is no indication in the record that [Stephanie Lundell] was personally involved in the Benton transaction or the mediation which resulted in settlement of the California Action against her husband." (App. at 184). There can be no basis for an award of punitive damages against her for merely being a guarantor under the settlement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

TERRY LUNDELL

Date: May 17, 1999

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-3684

Daniel Watkins; Cynthia Watkins, Appellees, v. Terry Lundell; Stephanie Lundell, Appellants.	* * * * * * * * * *	Appeal from the United States District Court for the Southern District of Iowa.

Submitted: November 20, 1998

Filed: February 26, 1999

Before BEAM, MAGILL, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

BEAM, Circuit Judge.

Terry and Stephanie Lundell (the Lundells) appeal the district court's partial denial of their motions to set aside default judgment. The district court set aside a portion of the default judgment, under Federal Rule of Civil Procedure 60(b)(6), in order to correct a computation of actual damages and to reduce punitive damages. The Lundells argue that the entire default judgment should be set aside. They contend, *inter alia*, that the

district court erred in awarding punitive damages. We affirm in part and reverse in part.

I. BACKGROUND

Terry Lundell, a resident of Tucson, Arizona, contracted to purchase approximately 5,381 acres of farmland in Iowa on March 26, 1990. He in turn advertised the property for sale in California where Daniel Watkins, a resident of Los Altos, California, contacted Lundell and agreed to purchase the property. As a down payment, Daniel Watkins delivered title and possession of a vintage Ferrari Testarossa, valued at $200,000. Daniel Watkins also paid a $25,000 loan origination fee and $8,000 for an appraisal. Terry Lundell accepted and sold the Ferrari but financial difficulties resulted in his failure to perform on his contract to purchase the Iowa property. The property was eventually forfeited, and without the property, Terry Lundell could not fulfill his contract to sell the land to Daniel Watkins. In 1992, Daniel Watkins and his wife, Cynthia Watkins (the Watkins), filed an action for breach of contract and fraud.

The Watkins' action was brought in the United States District Court for the Northern District of California, where it was referred for early mediation. The mediation resulted in a "Mutual Release and Settlement Agreement" (the settlement) that provided for dismissal of the contract and fraud action contingent on certain terms. The settlement required that Terry Lundell pay $25,000 to the Watkins within ten days, followed by three subsequent payments of $70,000 on November 1 of 1993, 1994, and 1995 with interest accruing on the unpaid balance at five

percent. Terry Lundell was also required to obtain a life insurance policy naming the Watkins as beneficiaries. As security for the settlement, Terry Lundell provided a confession of judgment, to be filed in the event of default, and mortgages on two of his other properties. His wife, Stephanie Lundell, signed the settlement as a guarantor. Despite an extension of time, the Lundells never paid any amount, the life insurance policy was never obtained, and the property used as security turned out to be worthless. After the Lundells defaulted on the settlement contract, the Watkins filed the confession of judgment.

On July 9, 1993, the Watkins brought the present action for breach of the settlement agreement and fraud in inducing the settlement. For reasons unknown and irrelevant here, this action was brought in the United States District Court for the Southern District of Iowa. The Lundells were personally served and read and understood the summons and complaint. Just before the expiration of time for filing an answer, Terry Lundell contacted an Iowa attorney concerning representation. The Iowa attorney, being informed that an answer was due, contacted opposing counsel and received an extension of time to answer. However, before accepting the representation, the Iowa attorney requested a retainer and documents relating to the circumstances giving rise to the lawsuit. Terry Lundell agreed that he would provide the retainer and documents but never contacted the Iowa attorney again. An answer was never filed.

Meanwhile, the Watkins attempted to collect on the confessed judgment from the first action in California,

and while doing so were contacted by an Arizona attorney representing the Lundells. The Arizona attorney indicated that the Lundells were contemplating bankruptcy and were prepared to offer the Watkins a quitclaim deed to some property, with allegedly $10,000 in equity, a third-position deed of trust to some parcels of land, and an unsecured interest-free promissory note in the amount of $75,000. This offer was to be in settlement of all the Watkins' claims. The Watkins rejected the offer out-of-hand, and the Lundells made no further contact.

No answer having been filed, the Watkins moved for entry of default in the present action. Default was entered against the Lundells, and the action was referred to a magistrate judge for a determination of damages. The magistrate judge held a hearing, at which the Lundells were not present, and found that the Lundells had fraudulently induced the Watkins to settle and had deliberately decided not to defend the present action. Evidence provided by the Watkins estimated Terry Lundell's net worth to be approximately $11,000,000. The magistrate judge prepared a report and recommendation calling for actual damages of $335,000 and punitive damages of $3,500,000 against the Lundells.

The district judge reviewed the record and adopted the magistrate judge's report and recommendation and entered default judgment on February 16, 1994. In June 1995, the Watkins filed the default judgment in Pima County, Arizona, whereupon the Lundells promptly filed the motions which are the subject of this appeal. On July 6, 1995, the Lundells moved to set aside the default judgment under Federal Rule of Civil Procedure 55(c), 60(b)(4), (5), and (6), by the ancillary remedy of a Bill of

Review, and under the Soldiers' and Sailors' Civil Relief Act of 1940. *See* 50 U.S.C. §§ 501-591. The motions were referred to a magistrate judge for a report and recommendation.

The magistrate judge recommended that a portion of the default judgment be set aside and partial relief be granted under Federal Rule of Civil Procedure 60(b)(6). The report and recommendation concluded that actual damages should be reduced to $235,000 because of an error in calculation, and that punitive damages against Stephanie Lundell be reduced to $117,500 because of injustice. The magistrate judge did not recommend relief from the punitive damages awarded against Terry Lundell because Lundell's actions evidenced a pattern of fraud and deceit. Furthermore, Lundell withheld information necessary to make a more accurate determination of punitive damages. The district court adopted the report and recommendations in full, thus granting in part and denying in part the Lundells' motions to set aside default judgment.[1]

II. DISCUSSION

We review a determination to set aside default judgment under Federal Rule of Civil Procedure 60(b) for abuse of discretion. *See Nucor Corp. v. Nebraska Pub. Power Dist.*, 999 F.2d 372, 374 (8th Cir. 1993). Although the

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[1] The district court also denied the Lundells' subsequent motion to amend the findings of fact and judgment. This motion is nothing more than a second attempt to obtain relief and is subsumed in the Rule 60(b)(6) analysis.

Lundells moved for relief from the default judgment under several theories, only Rule 60(b)(6) is applicable.[2] A Rule 60(b)(6) motion, made within a "reasonable time," can provide relief from a judgment, including a default judgment, for "any other reason justifying relief from the operation of the judgment," Fed. R. Civ. P. 60(b)(6), thus allowing a district court to inject equity and revive an otherwise lifeless claim. *Cf, Klapprott v. United States*, 335 U.S. 601, 614-15 (1949) (finding that Rule 60(b)(6) enables a court to "accomplish justice"); *Hoover v. Valley West D M*, 823 F.2d 227, 230 (8th Cir. 1987) (weighing the "equities involved" on a Rule 60(b) motion).

A. Reasonable Time

Before considering the merits of a Rule 60(b)(6) motion, we must consider whether the motion was made within a reasonable time. What constitutes a reasonable time is dependent on the particular facts of the case in question and is reviewed for abuse of discretion. *See Federal Land Bank v. Cupples Bros.*, 889 F.2d 764, 767 (8th Cir. 1989).

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[2] Parts (4) and (5) of Rule 60(b) are of no help to the Lundells as they provide relief when a judgment is void, satisfied, released, discharged or an underlying judgment upon which the instant judgment is based was reversed, vacated or should no longer have prospective application. *See* Fed. R. Civ. P. 60(b)(4) & (5). No such allegations are made and the district court properly disposed of those claims, leaving only Rule 60(b)(6). The district court also correctly dismissed claims for relief under Federal Rule of Civil Procedure 55(c), Bill of Review, and the Soldiers' and Sailors' Civil Relief Act.

We have considerable trepidation about whether the Lundells' Rule 60(b)(6) motion was made within a reasonable time since they allowed the default judgment to stand, without objection, for approximately seventeen months. Nevertheless, the district court did not address the issue and neither of the parties have raised it. In fact, when counsel for the Lundells was questioned at oral argument about how a district court could review this case under Rule 60(b)(6), he responded that "I found no objection to that procedure, and I thought that the court had exercised equitable powers and what I thought was appropriate judgment in the effort to seek overall fairness and justice."[3] From the total dearth of treatment on the issue of reasonable time, we conclude that it is not properly before us on appeal.

B. Exceptional Circumstances

The Watkins are content with the partial relief granted the Lundells by the district court. They do not argue that the partial relief was inappropriate, but seek only to uphold the district court's ruling. The Lundells, however, contend that the entire default judgment should be set aside pursuant to Rule 60(b)(6). The Lundells raise eleven separate arguments ranging from lack of proper

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[3] Both parties seem to almost entirely overlook the procedural context in which this case arises. Very little discussion of the standards under Rule 60(b) were addressed in the briefs or mentioned at oral argument – even though both parties were extensively questioned on the issue. Yet, the district court clearly based its decision on Rule 60(b)(6), and we review that decision.

venue to error in awarding punitive damages. The only argument of merit relates to punitive damages, which we review under the Rule 60(b)(6) framework.

"Relief under Rule 60(b) is an extraordinary remedy," *Nucor*, 999 F.2d at 374, since exceptional circumstances must exist to justify intrusion into the sanctity of a final judgment. *See Rosebud Sioux Tribe v. A & P Steel, Inc.*, 733 F.2d 509, 515 (8th Cir. 1984). To justify intrusion into the final judgment, the Lundells contend that either (1) Iowa's requirements for punitive damages are not met, or (2) the punitive damages awarded in this case are excessive and unconstitutional.

Under Iowa law, punitive damages are appropriate where the conduct constitutes "willful and wanton disregard for the rights or safety of another." Iowa Code Ann. § 668A(1)(a). This case arises from a breach of contract. While an ordinary breach of contract does not give rise to punitive damages in Iowa, if the breach is accompanied by or results in independently tortious actions or fraudulent activity then punitive damages are permissible. *See Pogge v. Fullerton Lumber Co.*, 277 N.W.2d 916, 919-20 (Iowa 1979). The district court found that the Lundells' actions constituted "willful and wanton disregard for the rights of Daniel and Cynthia Watkins." *Watkins v. Lundell*, No. 4-93-CV-10487, slip op. at 9-10 (S.D. Iowa Jan. 11, 1994) (report and recommendation adopted in full by district court). That finding satisfies the requirements for punitive damages under Iowa law.

The Lundells want to revisit the factual findings under Rule 60(b)(6). The district court refused to review

the findings of willful and wanton disregard for the Watkins' rights. We agree with this approach and find no abuse of discretion. The Lundells have shown no exceptional circumstances on this issue. If we were to revisit factual findings without some showing of exceptional circumstances, then Rule 60(b)(6) would be nothing more than an end-run around the entire judicial process. Therefore, we turn to the Lundells' argument of excessive and unconstitutional punitive damages.

We first consider the abstract question whether an award of excessive and unconstitutional punitive damages in and of itself presents exceptional circumstances. The Supreme Court has expressed a profound concern for "unlimited judicial discretion" in fixing punitive damages. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991). To avoid unlimited judicial discretion, the Supreme Court has scrutinized the procedures for reviewing punitive damages as well as the substantive considerations. *See, e.g., BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (engaging in extensive and meticulous review of the state procedure and relevant substantive guideposts for reviewing a jury award of punitive damages); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) (same); *Haslip*, 499 U.S. at 18-23 (same). Procedural and substantive strictures are necessary to ensure that punitive damage awards, which are proxy for punishment and deterrence, comply with constitutional requirements. *See Haslip*, 499 U.S. at 19; *see also Midwest Home Distrib., Inc. v. Domco Indus.*, 585 N.W.2d 735, 743 (Iowa 1998) (stating purposes of punitive damages).

In the Lundells' case, relevant substantive factors, such as the degree of reprehensibility, the ratio of actual to punitive damages and the wealth of the defendant were analyzed. However, the procedural context raises concerns. The $3,617,500 in punitive damages was awarded on default and reviewed only by the judge who entered the judgment. We think that this measure of review does not comport with the Supreme Court's pronouncements. *Cf. Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994) (holding that denial of judicial review of punitive damages violates the Due Process Clause). In light of these concerns, and because of the equitable nature of the inquiry, we agree with the district court, that exceptional circumstances exist justifying operation of Rule 60(b)(6).

We next consider whether the punitive damages assessed against Terry and Stephanie Lundell, in the amount of $3,500,000 and $117,500 respectively, are excessive and unconstitutional. The constitutionality of punitive damages is reviewed under the due process clause to determine if they are "grossly excessive." *BMW*, 517 U.S. at 568. The Supreme Court in *BMW* considered three guideposts to determine if punitive damages are grossly excessive: (1) the degree of reprehensibility of the parties' actions; (2) the ratio between the actual harm inflicted and the punitive damages; and (3) the difference between the punitive damages and the civil penalties authorized or imposed in comparable cases. *See id.* at 575. We review the punitive damage awards against Terry and Stephanie Lundell separately and consider first the award against Terry Lundell – $3,500,000.

The degree of reprehensibility is "[p]erhaps the most important indicium of the reasonableness of a punitive

damages award." *Id.* The degree of reprehensibility is also indicative of the constitutionally permissible size of the punitive damage award. The higher the degree of reprehensibility, the larger the punitive damages award it can support. Therefore, the punitive damages should be roughly proportionate to the enormity or gravity of the offense. *See id.* at 575-76.

The reprehensible conduct in question involves a breach of contract and fraud claim. The Watkins agreed to settle their breach of contract and fraud claim based on representations made by Terry Lundell. The first payment, only a small portion of the total required under the settlement, was due ten days after the settlement was finalized. Despite an extension and despite years of subsequent efforts, the Lundells have never paid any of the settlement. It is a fair inference, based on previous conduct, conduct during the settlement, and subsequent conduct, that Terry Lundell induced the settlement agreement knowing he would never pay any amount. Terry Lundell also gave worthless property as security and false assurances. He has repeatedly attempted to avoid and to delay his obligations in detriment to the rights of the Watkins.

The district court found that Terry Lundell engaged in a "pattern, practice or scheme characterized by fraud and deceit." *Watkins v. Lundell*, No. 4-93-CV-10487, slip op. at 23-24 (S.D. Iowa April 21, 1997) (report and recommendation adopted by district court). This is certainly more reprehensible than mere negligence. *See BMW*, 517 U.S. at 576. We agree with the district court that Terry Lundell's conduct is reprehensible, thereby supporting a

punitive damages award, but question whether his conduct constitutes "the high degree of culpability that warrants a *substantial* punitive damages award." *Id.* at 580 (emphasis added).

The second guidepost is the ratio of punitive damages to the harm inflicted. There must be a "reasonable relationship" between the two. *Id.* Punitive damages of $3,500,000 versus actual damages of $235,000 represents a ratio of 14.89-to-1. While there is no mathematical formula marking the constitutional line for grossly excessive punitive damages, *see id.* at 582, the ratio here is very high. *Cf. Dean v. Olibas,* 129 F.3d 1001, 1007 (8th Cir. 1997) (finding a 14-to-1 ratio very high).

In *Haslip*, 499 U.S. at 23, the Supreme Court found that a 4-to-1 ratio was "close to the line" of constitutional impropriety in a case involving fraud by an insurance agent. In the present case, we have fraud in the inducement of a settlement agreement where both sides were sophisticated and represented by counsel. The actions in *Haslip* are not so dissimilar from Terry Lundell's, yet the actions in *Haslip* hardly supported a ratio of 4-to-1. On review of this record, we are not convinced that the conduct of Terry Lundell is reprehensible enough to justify greater than a 4-to-1 ratio.

The third *BMW* guidepost instructs courts to compare the punitive damages to comparable civil or criminal sanctions imposed for the conduct. *See BMW*, 517 U.S. at 583-84. The most comparable civil sanction for Terry Lundell's actions would be for fraudulent practices, which carries a maximum fine of $10,000. *See* Iowa Code Ann. § 714.8 (defining fraudulent practices); Iowa Code Ann.

§ 714.9 (making a fraudulent practice, involving over ten thousand dollars a class "C" felony); Iowa Code Ann. § 902.9 (setting the maximum fine and imprisonment for a class "C" felon). For Terry Lundell, the maximum fine for his conduct compared to the $3,500,000 in punitive damages represents a ratio of 350-to-1. Under this guidepost, the "monetary comparisons are [also] wide." *Haslip*, 499 U.S. at 23.

The district court, following *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 659 (8th Cir. 1995) (Justice Byron R. White, Retired Associate Justice of the United States Supreme Court, sitting by designation), also considered Terry Lundell's wealth. Although *BMW* analyzed three relevant guideposts, they are not the exclusive factors. *Cf. Haslip*, 499 U.S. at 22 (concluding that certain factors considered by the state, including "financial position," were sufficient). We also find the wealth of the defendant an appropriate consideration here. Terry Lundell's net worth was found to be $11,000,000. This finding is now vigorously disputed by Terry Lundell, but he refuses to provide any contrary evidence. We must accept it as true. Even so, we find that an award of $3,500,000 in punitive damages compared to a net worth of $11,000,000 is excessive.

In view of these considerations, we conclude that the punitive damages award against Terry Lundell is exaggerated. Furthermore, in *Pulla* we stated that although the presence of these guideposts or factors may justify a large punitive award, their absence may also "counsel against a large award." *Pulla*, 72 F.3d at 659 (speaking of analogous factors). In keeping with *Pulla*, we find Terry Lundell's conduct justifies punitive damages, but are not persuaded that the award should exceed a 4-to-1 ratio

($940,000) in this case. Thus, we find that the district court abused its discretion by failing to exercise its power under Rule 60(b)(6) to set aside the default judgment and reduce the punitive damages award against Terry Lundell.

Punitive damages, in the amount of $117,500, were also awarded against Stephanie Lundell. The Watkins argue that as Terry's wife, she was fully aware of all that occurred and should therefore be responsible for punitive damages. The Lundells contend that Stephanie Lundell acted only as a guarantor. The record supports the Lundells' contention. Stephanie Lundell's conduct lacks the requisite reprehensibility. Simple failure to pay as a guarantor does not suggest the type of conduct, such as fraud, deceit or trickery, associated with punitive damages. The fact that the punitive damages award is half the compensatory damages does not save this from the requirements of due process.

The magistrate judge had a "serious concern" about the constitutionality of the punitive damages award against Stephanie Lundell, and reduced the original amount. *Watkins*, slip op. at 19 (April 21, 1997). We agree with the underlying concerns articulated by the magistrate judge and find that the district court abused its discretion by failing to eliminate the punitive damages award against Stephanie Lundell.

III. CONCLUSION

For the foregoing reasons we affirm in part and reverse in part the district court's denial of relief from

default judgment under Rule 60(b)(6) and remand to the district for proceedings consistent with this opinion.

MORRIS SHEPPARD ARNOLD, dissenting.

I respectfully dissent from the judgment of the court.

In the first place, I would hold that relief from this judgment is simply not available under Rule 60(b)(6) because the requisite exceptional circumstances are not present. The Lundells allege nothing but an error of law, and if every error of law is sufficient to undermine a judgment, the entire doctrine of *res judicata* is undone.

The supposed error of constitutional law on which the court bases its relief, moreover, is not in fact an error of law: The judge who entered the default judgment performed, as the court itself admits, an analysis that comported with due process before it awarded damages. There is no constitutional right to have this process repeated if the judgment is not appealed. The court's reliance on *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) is misplaced, for that case simply held that the complete absence of judicial review of punitive damage awards was unconstitutional.

Finally, even if Rule 60(b)(6) was appropriately invoked here, and even if I thought it proper to undertake a review of the punitive damage award, I would not find the award to be grossly excessive under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). *Cf. Dean v. Olibas*, 129 F.3d 1001 (8th Cir. 1997).

I would therefore reverse the judgment of the district court and remand the case for entry of judgment in the amount of the original default judgment.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DANIEL WATKINS; CYNTHIA WATKINS, Plaintiffs, v. TERRY LUNDELL; STEPHANIE LUNDELL, Defendants.	)	Civil No. 4-93-cv-10487 ORDER FOLLOWING REMAND

(Filed Apr. 29, 1999)

On March 26, 1999, mandate issued from the United States Court of Appeals for the Eighth Circuit with respect to its judgment remanding this case to the district court for proceedings consistent with the opinion of the Eighth Circuit. That opinion affirmed in part and reversed in part this court's ruling on what was treated as a motion by defendants for relief from judgment or order under Fed. R. Civ. P. 60(b)(6). The Eighth Circuit held that punitive damages against defendant Terry Lundell should be reduced to an amount not exceeding $940,000 and that the punitive damages award against Stephanie Lundell should be eliminated. By Order entered April 1, 1999, the parties were given an opportunity to be heard further with regard to the judgment to be entered in compliance with the mandate. Neither side has requested further hearing within the time provided.

In compliance with the mandate of the Eighth Circuit, the default judgment for punitive damages against

both defendants is VACATED and the Clerk shall enter the following substituted judgment for punitive damages:

> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of plaintiffs and against defendant Terry Lundell for punitive damages in the amount of $940,000. No judgment for punitive damages is entered against defendant Stephanie Lundell.

In all other respects the amended judgment against defendants of July 23, 1997 remains as previously entered.

IT IS SO ORDERED.

Dated this 29th day of April, 1999.

/s/ Ronald E. Longstaff
RONALD E. LONGSTAFF
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DANIEL WATKINS and CYNTHIA WATKINS, Plaintiffs, v. TERRY LUNDELL and STEPHANIE LUNDELL, Defendants.	Civil No. 4-93-cv-10487 REPORT AND RECOMMENDATION CONCERNING DEFENDANTS' COMBINED MOTIONS TO SET ASIDE DEFAULT PURSUANT TO FED. R. CIV. P. 55(c), 60(b)(4), (5), and (6); FOR BILL OF REVIEW IN EQUITY; AND TO VOID DEFAULT JUDGMENT PURSUANT TO THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940 (Filed Apr. 21, 1997)

The above resisted motions are before the Court. They were filed by defendants on July 6, 1995. The motions were referred to the undersigned United States Magistrate Judge by Judge Longstaff on July 24, 1995 for report and recommendation in accordance with 28 U.S.C. § 636(b)(1)(B). The motions came on for evidentiary hearing on December 16, 1996. Plaintiffs appeared by their counsel, Mr. Denny M. Dennis. Defendant Terry Lundell appeared pro se. His wife, Stephanie Lundell, did not appear. Post-hearing proposed findings and argument have been received and the matter is now fully submitted.

FACTUAL AND PROCEDURAL BACKGROUND

This action was originally filed on July 9, 1993. It alleged breach of the terms of an agreement to settle a lawsuit in the United States District Court for the Northern District of California and fraud in connection with representations made to plaintiffs concerning the agreement. Actual and punitive damages were claimed.

It is appropriate to briefly review the dealings between the parties preceding the initiation of this action and the subsequent procedural history. More detail can be found in Judge Bennett's January 11, 1994 Report and Recommendation. On March 26, 1990, Terry Lundell entered into a real estate contract with A. C. and Neva Benton to purchase about 5,380 acres of farm ground in Franklin and Butler Counties, Iowa. The contract price was $6,000,000, $400,000 of which was to be down. Terry Lundell in turn advertised the property for sale on the west coast and plaintiff Daniel Watkins, a resident of Los Altos, California, responded. Negotiations ensued and on May 13, 1990, Watkins and Terry Lundell executed a real estate contract for the property. The contract price was $7,800,000, $5,600,000 of which was to be financed. The closing was to be December 1, 1990. Watkins paid a $200,000 down payment by giving Terry Lundell title to a vintage 1985 Ferrari automobile then valued at approximately that amount. Lundell experienced financial difficulties and Watkins also had problems lining up financing which he blamed in part on Lundell. Lundell had discussions with both the Bentons and Watkins about restructuring the deals, but both ultimately fell through. Lundell did not perform under the Benton contract and it was eventually forfeited. As a result, Lundell was also

unable to meet his obligations under the contract with Watkins. In the interim, Watkins had paid a $25,000 loan origination fee and $8,000 for an appraisal in attempting to arrange for financing.

In 1992, Watkins and his wife sued Terry Lundell in the Northern District of California. The action was for breach of contract and fraud. Stephanie Lundell was not a party. Apparently, Terry Lundell counterclaimed. The case was referred for "early neutral evaluation" and a mediation was held which resulted in settlement. A "Mutual Release and Settlement Agreement" was executed by the parties and the California action was dismissed. By the terms of the agreement, Terry Lundell agreed to pay plaintiffs $235,000[1] in four installments. Exhibit 10, at tab 7 p. 3. Twenty-five thousand dollars was due within ten days, the second installment of $70,000 was due on November 1, 1993, the third installment of $70,000 was due on November 1, 1994, and the final installment of $70,000 was due on November 1, 1995. The balance accrued interest at five percent. Payment of these amounts was secured by a confession of judgment executed by Terry Lundell in the amount of $350,000[2] and his

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[1] The January 11, 1994 Report and Recommendation put the total figure at $335,000, but in fact the total is $235,000.

[2] When Terry Lundell defaulted on the settlement agreement, the confession of judgment was filed in the Northern District of California and has since been transcripted to state courts in Utah, Iowa, Arizona, and Colorado. Exhibit 10, at tabs 8, 10-13. The confession of judgment was expressly as "security [for Terry Lundell's] monetary obligation" and the right to file the judgment was "in addition to any other rights or remedies [Daniel Watkins] would have as a result of any default

execution of a mortgage on two properties, 6,000 acres of land in Pueblo, Colorado and a one acre parcel near Park City, Utah. Terry Lundell was also to purchase a life insurance policy as further security. Stephanie Lundell had no obligations under the settlement agreement except as guarantor of her husband's performance. Plaintiffs had demanded this condition. There is no indication in the record that she was personally involved in the Benton property contracts or the mediation which resulted in the settlement of the California federal action against her husband.

Despite an extension, Terry Lundell did not pay the first installment, or any subsequent installments. Nor has Stephanie Lundell paid any amount as guarantor. In addition, as the court has found previously:

> Terry Lundell has failed to secure the required life insurance policy. The properties pledged . . . as security have proven to be worthless and without sufficient equity to satisfy any part of the settlement amounts contained in the Mutual Release and Settlement Agreement.

January 11, 1994 Report and Recommendation at 8.

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or breach" of the settlement agreement. Exhibit 10, at tab 7 pp. 4-5. The default has waived any defense defendant might have had based on a judgment on the same matter in another court. *See* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 4442, at 373 ("[v]alid default judgments establish claim and defense preclusion in the same way as litigated judgments. . . . "). As the California judgment is security for the obligation sued on in this court, any recovery under either judgment would be a credit with respect to the other.

As noted, on July 9, 1993, plaintiffs filed the present lawsuit. On August 28, the Lundells were personally served with Summons and Complaint. They did not file an appearance or move or plead. Both Terry and Stephanie Lundell read the Summons and Complaint and understood them and the consequences if they failed to respond. Specifically, they knew a default would be entered against them if they did not respond. Stephanie relied on her husband to handle the matter. *See* Stephanie Lundell Depo. at 18.

On September 16, 1993, Terry Lundell called West Des Moines attorney John Conger concerning potential representation in this action. Lundell had been referred to Conger by another Des Moines area attorney. Lundell told Conger about the lawsuit and solicited his interest in representing him. Conger understood from Lundell that an answer to the complaint was due in a day or two and told him that before he could discuss representation he would need to talk to opposing counsel, Mr. George LaMarca, to get additional time. Conger then called LaMarca and explained he had been contacted by Mr. Lundell. Conger asked LaMarca for a couple of additional weeks in order to obtain information and determine whether he would represent Lundell. LaMarca agreed to allow two weeks and Conger confirmed this in writing with LaMarca. Exhibit 10, at tab 15. Conger then called Lundell and the two had a second conversation, also on September 16. Conger told Lundell that LaMarca had assured him he could have a couple of weeks to look into the matter. Conger asked Lundell for three things, a retainer in the amount of $5,000, the federal Complaint, and documents relating to the circumstances giving rise

to the lawsuit. Lundell responded he would send the retainer and written materials within a few days. Mr. Lundell, however, did not send any of these items or subsequently contact Mr. Conger concerning the case.

On September 23, 1993, plaintiffs retained Des Moines attorney Jerrold Wanek to attempt to collect on the confession of judgment which had been filed in the Northern District of California. Exhibit 10, at tab 16. Terry Lundell hired Tucson, Arizona attorney Michael Stofko to negotiate with plaintiffs. Tr., at 106-08. The Lundells lived in Tucson. Mr. Lundell told Stofko about this lawsuit. Tr., at 49. On October 27, 1993, Stofko wrote a letter to plaintiffs in care of Wanek in which he indicated he was representing the Lundells and they were considering filing bankruptcy. On behalf of the Lundells, Stofko proposed they would quit claim a Utah property with a small amount of equity and execute an unsecured promissory note in the amount of $75,000 in settlement of plaintiffs' claims under the settlement agreement. The proposal was rejected by correspondence dated November 3 and Mr. Lundell was informed of the rejection within a few days. Tr., at 109; Exhibit 10, at tab 18. Mr. Lundell did nothing further, and presumed a judgment would be entered. Tr., at 110.

On November 15, 1993, Mr. LaMarca's co-counsel, Mr. Robert K. DuPuy called Mr. Conger and asked if he was representing Mr. Lundell. Conger responded he was not, and told DuPuy he was not aware whether Lundell had secured other representation. Plaintiffs moved for entry of default on November 18, 1993, and default was entered by the Clerk on November 23. The matter was

referred to then-Magistrate Judge Bennett, who, following hearing, issued a January 11, 1994 Report and Recommendation that judgment be entered against defendants in the amount of $335,000 plus interest at five percent per annum in actual damages, and $3,500,000 in punitive damages. The punitive damages award was based on a finding that the Lundells fraudulently induced plaintiffs to enter into the settlement agreement. The report and recommendation was adopted by Judge Longstaff on February 16, 1994 and judgment was entered that date.

The Court finds Terry Lundell, acting for himself and his wife, subsequent to conferring with Mr. Conger, made a deliberate decision not to defend this action with knowledge that a default judgment would eventually be entered. This is evident from Mr. Lundell's abandonment of his efforts to retain Mr. Conger, the attempt instead to renegotiate through Mr. Stofko, and Mr. Lundell's testimony at hearing.[3] Plaintiffs did not thereafter inquire as

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[3] Mr. Lundell testified as follows at the evidentiary hearing:

Q. You knew that you had to file an answer, or some sort of paper or document in court to respond to that lawsuit, or that a judgment would be rendered against you for the relief demanded in the complaint. You knew that, didn't you?

A. I knew that they would seek to – for a compliance with the settlement agreement in California, yes.

Q. My question is this: When you were served with the summons and complaint on August 28, '93, you read those documents and you understood them, correct?

A. Yes.

to the status of proceedings and took no action until they learned in June of 1995 that the default judgment had been filed of record in Pima County, Arizona. Combined Motions at 2. The Lundells then promptly retained Parkersburg, Iowa attorney David Mansheim, who filed the present Combined Motions on their behalf. Citing irreconcilable differences between client and attorney, and with the approval of the Lundells, Mr. Mansheim moved for leave to withdraw on February 1, 1996. This was granted and, after allowing the Lundells time to hire substitute counsel and a period for discovery, the motions were heard on December 16, 1996.

Further findings dealing with Mr. Lundell's motion under the Soldiers' and Sailors' Civil Relief Act are set out in the discussion which follows.

> Q. And you knew if you didn't file an answer, or hire counsel, or have somebody do this for you, file an answer or some sort of response to this lawsuit, that a judgment would be rendered against you for the relief that was being sought in the complaint. You knew that, didn't you?
>
> A. I knew they were seeking to perfect this, yes, but the extent that it went and the award, absolutely inconceivable.
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> Q. But you knew if you didn't file an answer or do something to defend against this lawsuit, that in fact that's what they were going to do?
>
> A. We went through this, and I contacted Mr. Stofko, and we tried to negotiate with them, yes.

Tr., at 103; *See also* Tr., at 106-110.

DISCUSSION

Defendants seek relief from the judgment under Fed. R. Civ. P. 55(c), 60(b)(4), (5) and (6), by the ancillary remedy of a Bill of Review, and under the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, 50 U.S.C. App. §§ 501-591. Only Rule 60(b)(6) – the catch-all clause – provides any basis for relief. Discussion of this will be reserved for last.

Rules 55(c),60(b)(4) and (5).

Rule 55(c) allows the Court to set aside an "entry of default" for good cause shown. Once judgment is entered on the default, Rule 60(b) governs. *See Canal Ins. Co. v. Ashmore*, 61 F.3d. 15, 17 (8th Cir. 1995); *United States ex rel. Time Equipment Rental & Sales, Inc. v. Harre*, 983 F.2d 128, 130 (8th Cir. 1993); *Widmer-Baum v. Chandler-Halford*, 162 F.R.D. 545, 549 (N.D. Iowa 1995); Fed. R. Civ. P. 55(c) ("if a judgment by default has been entered [the court] may likewise set it aside in accordance with Rule 60(b)"). Under Rule 60(b), the Court may grant relief from a judgment for six enumerated reasons. Defendants raise the last three:

> . . . (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b). There is no basis on this record to conclude the judgment is void under clause (4).[4] The Court has subject matter (diversity) and personal jurisdiction. *See Printed Media Services, Inc. v. Solna Web, Inc.*, 11 F.3d 838, 842-43 (8th Cir. 1993) (judgment is void if the court lacks personal jurisdiction), 11 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2862, at 326-29 (hereinafter "11 Wright and Miller") (judgment "is void only if court lacks jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law"). The judgment was not entered in a manner inconsistent with due process. *See Orner v. Shalala*, 30 F.3d 1307, 1310 (10th Cir. 1994). In this latter regard, plaintiffs complain venue was improper in this district and of a lack of notice to them and Mr. Mansheim, who had represented the Lundells in a related case in this court,[5] of the entry of default and proceedings following.

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[4] A judgment entered in violation of the Soldiers' and Sailors' Civil Relief Act is voidable, not void. *See infra* at 13-14.

[5] In this district, plaintiffs also sued the realtor, Knudsen, hired by Lundell to broker the Benton property. *See* January 11, 1994 Report and Recommendation at 4-5. The court file, of which the Court has taken notice in light of the reference to it in the Combined Motions (Motions at 3 and attached Exhibit 1), indicates Knudsen filed a third-party action against Terry Lundell. Attorney Mansheim appeared and answered the Third-Party Complaint on behalf of Lundell and counter-claimed against Knudsen. *See Daniel Watkins and Cynthia Watkins*, Plaintiffs, v. *Donald Knudsen, et al.*, Defendants v. *Terry Lundell*, Third-Party Defendant, Civil No. 4-92-cv-10294 (S.D. Ia.) The action was filed on May 6, 1992 and dismissed by stipulation on October 27, 1993. This indicates Terry Lundell probably was dealing with Mr. Mansheim concerning the *Knudsen* litigation prior to the November 23, 1993 entry of default in this case,

Combined Motions at 3. Absent "timely and sufficient objection" improper venue does not impair the court's jurisdiction. 28 U.S.C. § 1406(b). The settlement agreement involved a dispute over the sale of Iowa farm property and payments under it were to be delivered to plaintiffs' attorneys at their West Des Moines, Iowa address. Plaintiffs therefore had some basis to file in this state and district under the theory that "a substantial part of the events or omissions giving rise to the claim occurred" here. 28 U.S.C. § 1391(a)(2). Defendants were entitled to pre-judgment notice only if they had appeared, which they did not. Fed. R. Civ. P. 55(b)(2); *see* Fed. R. Civ. P. 5(a).

Rule 60(b)(5) is also unavailing for defendants. The judgment has not been satisfied, released or discharged. The "prospective application" clause does not apply where the judgment is solely for money damages. Money damages are a "present remedy for a past wrong" and as such, are not prospective. *McDonald v. Oliver*, 642 F.2d 169, 171 (5th Cir. 1981); *see Twelve John Does v. District of Columbia*, 641 F.2d 1133, 1138-39 (D.C., Cir. 1988); *In Re Fine Paper Antitrust Litigation*, 840 F.2d 188, 193-94 (3d Cir. 1988); 11 Wright & Miller, *supra* § 2863, at 337-38.

Bill of Review.

The equitable remedy of a Bill of Review is no longer recognized under the federal rules as a means to obtain relief from a civil judgment. *See United States v. Fonesca-*

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further indication that the Lundells had every opportunity to arrange for counsel to appear in their defense.

Martinez, 36 F.3d 62, 64 (9th Cir. 1994). Rule 60(b) expressly states:

> Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

The Advisory Committee Notes to Rule 60(b) indicate the Committee attempted to include in the rule all of the remedies and types of relief from judgments formerly available under the ancient forms of common law practice. Relief is now available only under the rule or by independent action. 11 Wright & Miller, *supra* § 2867 at 395. *Soldiers' and Sailors' Civil Relief Act.*

Terry Lundell asks the Court to void the judgment against him under the Soldiers' and Sailors' Civil Relief Act of 1940. He is currently a Lieutenant Colonel in the U. S. Air Force Reserve. Exhibit I. During the relevant time period, Lundell, then a Major, was an operations officer with his unit, an air refueling squadron. He is also a pilot and instructor. His operational duties involved more work than is customary for a reservist. Between service of the Summons and Complaint on August 28 and the entry of default on November 23, Lundell was engaged in some type of military activity on thirty-six days. *See* Exhibits 3, 12. Between November 23 and the entry of judgment on February 16, 1994, he was involved with the military on thirty-three days. The duty codes on the relevant military records in evidence indicate that sometimes when performing military activities Lundell was on active duty, and at other times not. For most of

the entries his duty status is unclear. *See* Exhibit 3. Giving Mr. Lundell the benefit of the doubt, the most the record indicates is that periodically during the relevant time period he was on active duty with his unit the longest period of which was ten days.[6]

The Act provides:

> (1) In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service.

50 U.S.C. App. § 520(1). If the defendant is in military service, no default judgment is to be entered except upon court order following appointment of an attorney to represent the defendant, and the court may require a bond to indemnify the defendant from loss should the judgment later be set aside. *Id.* The term "military service" is defined as "Federal service on active duty with any branch" of the Armed Forces. 50 U.S.C. App. § 511(1). Construing the statute liberally, the Court will treat Terry Lundell's reserve duty as "in military service." *See In Re Marriage of Brazas*, 278 Ill. App. 3d 1, 662 N.E.2d 559, 560-61 (Ill. App. 1996); *Cornell Leasing Corp. v. Hemmingway*, 147 Misc. 2d 83, 553 N.Y.S.2d 285, 286 (Civ. Ct. N. Y. 1990).

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[6] A June 29, 1995 letter from Lundell's operations officer indicates he was "on duty" between November 23, 1993 and February 16, 1994. Exhibit 7. The letter does not specify the type of duty or the days on which service occurred.

The affidavit of Mr. DuPuy in support of the motion for entry of default judgment averred only that defendants were "not infants or incompetent persons, nor are they under any other legal disability within the meaning of Fed. R. Civ. P. 55(b)(1) or (2)."[7] The affidavit did not allege, or set forth facts, showing that defendants were not in military service, and accordingly was insufficient. A violation of the statute renders a judgment voidable, not void.[8] *See Davidson v. General Finance Corp.*, 295 F. Supp. 878, 881 (Dist. Ga. 1968); *Ostrowski v. Pethick*, 404 Pa. Super. 392, 590 A.2d 1290, 1294 (1991); *Krumme v. Krumme*, 6 Kan.App.2d 939, 636 P.2d 814, 817 (1981). Whether to set aside the judgment is governed by paragraph (4) of section 520:

> (4) If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person

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[7] Terry Lundell claims this affidavit amounted to a fraud on the court. *See Hadges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1325 (2d Cir. 1995). Mr. DuPuy testified he researched the issue and concluded that the Soldiers' and Sailors' Civil Relief Act applied to full-time or active members of the military and that Lundell was not under a disability by reason of the Act. That Lundell was a "part-time" Air Force pilot and had invoked the Act in the litigation with the Bentons was referenced in counsel's questions at the default hearing. Exhibit 11, at 10. This, coupled with the ambiguities concerning Terry Lundell's duty status, is against any finding of fraud.

[8] The Act does not afford any protection from the default to Stephanie Lundell as the spouse of a service member. *See Ray v. Porter*, 464 F.2d 452, 454 (6th Cir. 1972); *Crouch v. General Elec. Co.*, 699 F. Supp. 585, 595 n. 10 (S.D. Miss. 1988).

> was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. . . .

50 U.S.C. App. § 520(4). Preliminarily, the present motions were filed well over a year after any relevant period of active duty. During this entire time Terry Lundell knew he was in default and that a judgment could be entered against him. Yet he took no action to protect his rights under the Act. His application for relief comes too late. *See Morris Plan Bank of Georgia v. Hadsall*, 202 Ga. 52, 41 S.E.2d 881, 882 (1947).

Apart from timeliness, to set aside the default judgment the language of the statute indicates Lundell must establish (1) he was a person on "active duty" in the military; (2) it appears he has a meritorious defense to the action; and (3) that he was prejudiced in making a defense by reason of his military service. *See Ostrowski*, 590 A.2d at 1292; *Krumme*, 636 P.2d at 817. Assuming as before that the first of these elements is satisfied, and that Lundell has a defense to those parts of the action for fraud and punitive damages, he has not shown that his military service prejudiced him in making a defense. To the contrary, from his testimony it is clear it did not. Though he worked frequently at his military job, most of the time he was not on duty during the relevant period. He was not deployed for an extended period far from his

home. He contacted an Iowa attorney to represent him (indeed, while on duty, *see* Exhibit 12) but did not follow through with the information requested. He retained an Arizona attorney to attempt to negotiate with plaintiffs. He had appeared, defended and was prosecuting a counterclaim in the separate, related action in this court. *See* note 5, *supra*. He was carrying on his extensive farming business. He admitted that his military status did not prevent him from attending to his business or defending this action. Tr., at 112. As the Court has found, Mr. Lundell made a conscious decision not to defend this action. *See id.*

> The purpose of the Soldiers' and Sailors' Civil Relief Act was to protect persons in military service from having default judgments entered without their knowledge, not to prevent a judgment by default from being entered against such person, where that person was fully informed of the pendency of the action and had the time and opportunity to appear and defend himself or otherwise protect his rights.

Wilson v. Butler, 584 So.2d 414, 417 (Miss. 1991).

In the absence of prejudice, Mr. Lundell has not shown cause to void the default judgment under the Soldiers' and Sailors' Civil Relief Act. He had knowledge of the action and full opportunity to appear and defend.

Rule 60(b)(6).

Finally, there remains the catch-all provision of Rule 60(b)(6): "any other reason justifying relief from the operation of the judgment." "Clause (6) provides 'a grand reservoir of equitable power to do justice in a particular

case when relief is not warranted by the preceding clauses.' " *Transaero, Inc. v. La Fuerza Area Boliviana*, 24 F.3d 457, 461 (2d Cir. 1994) (quoting 7 Moore's *Federal Practice* ¶ 60.27[2], at 295 (2d Ed. 1993)); *see Widmer-Baum*, 162 F.R.D. at 549. Nonetheless, relief under Rule 60(b)(6), like the other clauses of the rule, requires a showing of exceptional circumstances. *Transaero*, 24 F.3d at 461; *see United States v. One Parcel of Property*, 51 F.3d 117, 120 (8th Cir. 1995); *United States v. Young*, 806 F.2d 805, 606 (8th Cir. 1986), *cert. denied*, 484 U.S. 836 (1987). This is necessary "to preserve the delicate balance between the sanctity of final judgments and the incessant command of a court's conscience that justice be done in light of all the facts." *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 733 F.2d 509, 515 (8th Cir.), *cert. denied*, 469 U.S. 1072 (1984) (quoting *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980)).

With respect to both defendants, there is no reason to disturb the default judgment for amounts due under the settlement agreement, except as to the miscalculation of the amount.[9] They have not paid what they contractually owe. Rule 60(b)(6) is broad enough to allow correction of the amount of actual damages, and indeed, the miscalculation is the type of error which may be corrected by the Court on its own motion under Rule 60(a). Nor are exceptional circumstances shown to revisit the Court's findings that the Lundells engaged in fraudulent conduct and willfully and wantonly disregarded the rights of

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[9] No actual damages were found other than the amount due under the settlement agreement. January 11, 1994 Report and Recommendation at 8-9.

plaintiffs so as to warrant punitive damages. January 11, 1994 Report and Recommendation at 9-10. The Lundells made a deliberate decision not to defend and cannot complain of the consequences of which they had notice.

The ultimate question on defendants' motions is whether the punitive damages award of which they most complain should be reduced. They claim the award is excessive. Excessive damages which impose "extreme hardship or injustice" may warrant relief under clause (6). 11 Wright & Miller, *supra* § 2864, at 365. To a degree the analysis intersects with that recently articulated by the U. S. Supreme Court when punitive damages are challenged on substantive due process grounds. *See BMW of North America, Inc. v. Gore*, ___ U.S. ___, ___, 116 S. Ct. 1589, 1598-99 (1996). Before *Gore*, but after the default judgment in this case, the Eighth Circuit for the first time vacated a punitive damages award on due process grounds and in doing so outlined the factors to consider in determining reasonableness. *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 658 (8th Cir. 1995). For its part, the Iowa Supreme Court has recently signaled that Iowa courts have a duty to examine punitive damage awards to ensure they are within emerging constitutional boundaries. *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 144-148 (Iowa 1996). It is appropriate to take a second look at the punitive damages awards in this case in light of these post-judgment developments in relevant case law.[10] *Cf.*

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[10] Defendants have not expressly claimed the punitive damages awards against them violate their substantive due process rights. They have claimed, however, the awards are unreasonable and excessive and, as they are now proceeding

Adams v. Merrill Lynch Pearce Fenner & Smith, Inc., 888 F.2d 696, 702 (10th Cir. 1989) ("a change in relevant case law by the United States Supreme Court warrants relief under Fed. R. Civ. P. 60(b)(6)").[11]

A review of the record raises a serious concern about whether the award in Stephanie Lundell's case comports with substantive due process. Three principal "guideposts" help determine whether Stephanie Lundell had adequate notice of the penalty which might be imposed if she executed the settlement agreement in bad faith. These are: (1) "the degree of reprehensibility" of her conduct; (2) "the disparity between the harm or potential harm suffered by [plaintiffs] and [her] punitive damages award;" and, (3) "the difference between [the punitive damages] and the civil penalties authorized or imposed in comparable cases." *Gore*, ___ U.S. at ___, 116 S. Ct. at 1598-99. The Eighth Circuit has articulated a similar four factor test:

> Whether a punitive damages award is reasonable for purposes of due process, turns on: (1) the harm inflicted on the plaintiff; (2) the reprehensibility of the defendant's conduct; (3) the likely potential harm to others arising from the

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pro se, some liberality should be allowed in considering the scope of their claims.

[11] That substantive due process provided some limitation on the punishment of a tort feasor by punitive damages was understood at the time of the default in this case. *See TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 9-15, 23-24 (1991). What has occurred since has not so much changed the law as it has provided the analytical framework for addressing the issue. *See Gore*, ___ U.S. at ___, 116 S. Ct. at 1598-99.

complained of conduct; and (4) the wealth of the defendant.

Pulla, 72 F.3d at 659. The third and fourth of these factors were not relied on by the *Gore* court. *Gore*, however, does not indicate its guideposts are exclusive of other relevant factors. The third *Pulla* factor is closely related to the second *Gore* factor.

Moreover, the various opinions in *Gore's* predecessor, *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) support the Eighth Circuit's formulation. *See id.*, at 459-464, 468-69.

The decree of reprehensibility of Mrs. Lundell's conduct is objectively less than that of her husband. Stephanie Lundell was not a party to the transactions and events involving the real estate contracts at issue in the California litigation or in the litigation itself. Plaintiffs demanded she guarantee the amounts her husband promised to pay, and she agreed to do so. Her only representation in this regard is that contained in the settlement agreement. The primary obligations under the agreement were her husband's. Unlike the pattern of fraud and deceit plaintiffs attribute to Mr. Lundell, Stephanie's was "an individual instance of malfeasance." *Gore*, ___ U.S. at ___, 116 S. Ct. at 1599-1600; *see TXO*, 509 U.S. at 462 (plurality).

The second "guidepost," the ratio between the actual harm inflicted and the punitive damages awarded, requires consideration of the nature of the harm actually inflicted and the degree, as well as the harm likely to result from the defendants' conduct. *See Gore*, ___ U.S. at ___, 116 S. Ct. at 1601-02. Mrs. Lundell's conduct is not

only less reprehensible, but as a guarantor, one step removed in degree from the harm caused by her husband's failure to perform the primary obligation. The damages are a liquidated, economic loss arising preeminently from breach of contract to pay money. There is no risk of harm to others from Mrs. Lundell's conduct. *Pulla*, 72 F.3d at 619. In these circumstances, the nearly fifteen to one award is problematic. *See Haslip*, 499 U.S. at 7 n.2, 23 (insurance fraud case involving premiums purloined by agent – $840,000 punitive damages award more than four times actual damages "may be close to the line.").

As to the final guidepost, it is difficult to compare the punitive damages award here with sanctions for comparable misconduct. No supportive analog comes to mind for a bad faith failure by an individual to pay money due by contract.

The final factor considered by the Eighth Circuit is the wealth of the defendant. *Pulla*, 72 F.3d at 648; *see Wilson*, 558 N.W.2d at 148. At the default hearing, Daniel Watkins testified that Terry Lundell was a "huge operator" involved in a number of agricultural projects. Watkins testified Lundell told him he was worth $11,000,000. Exhibit 11, at 15. The court relied on this in fixing the amount of punitive damages. January 11, 1994 Report and Recommendation at 10. It is not clear, however, that the evidence of Terry Lundell's wealth should be attributed to Stephanie Lundell for punitive damages purposes. Terry Lundell and Stephanie Lundell were married in November 1989. Stephanie Lundell Depo. at 7. Stephanie Lundell graduated from medical school in 1984 and at the time this action was filed was employed as a staff physician at Hughes Missile Systems. *Id.* at 11. The Lundells

file separate tax returns. *Id.* at 26. It can be inferred from Stephanie's deposition, Terry Lundell's answers to interrogatories, and Mr. Lundell's course of dealing with plaintiffs that she is not much involved in Terry's farming business. *See* Exhibit 8 Ans. to Ints. 4, 5, 17 & 18; Exhibit 9 Supp. Ans. to Ints. 4, 18 & 22. Except for the guarantee in this case, she testified she is not obligated on Terry's business debts. *Id.* at 34.[12]

The doubtful constitutional validity of the large punitive damages award against Stephanie Lundell when post-judgment case law is considered, together with the severity of the penalty imposed afford sufficiently exceptional circumstances to invoke Rule 60(b) to avoid injustice in her case. The award should he reconsidered in light of the evidence produced at both the default judgment hearing and more recent motions hearing. The court has previously applied Iowa law to the punitive damages inquiry in this case. January 11, 1994 Report and Recommendation at 10. In Iowa, there are three primary factors to consider. These are set out in Iowa Civil Jury Instruction 210.1:

1. The nature of defendant's conduct.

2. The amount of punitive damages which will punish and discourage like conduct by the defendant in view of her financial condition.

3. The plaintiff's actual damages.

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[12] The Court notes, however, a number of default judgments have been entered against the Lundells jointly for apparently farm related debts. Exhibit 9 Supp. Ans. to Int. 9.

See Wilson, 553 N.W.2d at 147-48; *McGough v. Gabus*, 526 N.W.2d. 328, 334 (Iowa 1994); *Ezzone v, Riccardi*, 525 N.W.2d 388, 399 (Iowa 1994), *cert. denied*, 115 S. Ct. 1958 (1995). When these three factors are considered to the extent shown in the present record, the undersigned recommends that the punitive damages award against Stephanie Lundell be reduced to one-half of the actual damages: $117,500.

Though substantive due process concerns are applicable as well to the punitive damages award against Terry Lundell, he has not shown cause for relief. There are two related reasons for this conclusion. First, his conduct is more reprehensible. Second, Lundell has withheld critical information for the Court to consider in assessing whether he has suffered an injustice.

Terry Lundell was the one involved in allegedly defrauding Mr. Watkins in connection with the abortive purchase of the Iowa farm ground. It was Terry Lundell who negotiated the settlement of the California litigation and who had the primary obligation to make payments under the settlement agreement. The Court has previously found Terry Lundell failed to perform most of his material obligations under the contract and had no intent to do so. It is fair to infer from the previous report and recommendation that the court believed this was part of a pattern of malfeasance in his dealings with plaintiffs. January 11, 1994 Report and Recommendation at 4-10. "[P]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore*, ___ U.S. at ___, 116 S. Ct. at 1599. The reprehensibility index increases the more the loss appears to have been part of a

pattern, practice or scheme characterized by fraud and deceit. *See id.* at 1599-1600; *TXO*, 509 U.S. at 462 (plurality); *Haslip*, 499 U.S. at 23; *Wilson*, 558 N.W.2d at 147-48.

There was also the evidence at the default judgment hearing that Terry Lundell had a large farming operation scattered over several states and a net worth of about $11,000,000. Mr. Lundell vigorously disputes that he was ever worth anything approaching this amount, or that he made the statement Mr. Watkins attributed to him. In the course of discovery preparatory to the motions hearing, Lundell was asked to produce financial statements prepared in the past five years as well as applications for credit submitted within the same time period. These were not forthcoming, though the discovery responses indicated they would be supplemented to provide the information. In his testimony Lundell admitted the existence of the documents and that they would indicate his financial condition. Tr., at 89, 147-48, 156. Yet, he failed and refused to produce the documents, even after being ordered to do so by the Court. *Id.* This puts Mr. Lundell in the position of insisting the punitive damages award is unreasonable while at the same time refusing to produce the information which would enable the Court to determine what is reasonable. Rule 60(b)(6) invokes the Court's equitable power to grant relief from a judgment when the rule's specific grounds for relief do not apply. Exceptional circumstances are required and the burden is on defendants. "He who seeks equity must do equity" and come into court "with clean hands." *Myers v. Smith*, 208 N.W.2d 919, 921 (Iowa 1973). The court is not in a

position to afford relief on the grounds the punitive damages are unjust or "grossly excessive" when defendant has hidden a key piece of the puzzle.[13]

In view of the foregoing, IT IS RECOMMENDED that defendants' Combined Motions to Set Aside Default Judgment, for Bill of Review, and to Void Default Judgment Pursuant to the Soldiers' and Sailors' Civil Relief Act be denied except for the motion to set aside default judgment under Fed. R. Civ. P. 60(b)(6), which should be granted in part and denied in part. Relief from the judgment should be granted by amending it to reduce the actual damages found against both defendants to $235,000 plus interest at the rate of five percent per annum and to reduce the amount of punitive damages against Stephanie Lundell to $117,500. In all other respects, the judgment previously entered should remain in full force.

IT IS ORDERED that the parties have to and including May 23, 1997 to file written objections, pursuant to 28 U. S. C. § 636(b)(1), unless an extension of time for good cause is obtained. *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990). Such extensions will be freely granted. Any objections filed must identify the specific portions of the

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[13] At the conclusion of the evidentiary hearing, plaintiffs' counsel moved to strike the testimony of Mr. Lundell to the extent it was inconsistent with the evidence of his net worth received at the default hearing. Counsel argued this should be the sanction for not providing financial information as ordered by the Court. Tr., at 251-55. Such a sanction is allowed by Fed. R. Civ. P. 37(b)(2)(A), (B), but under the Circumstances I believe it is best to accept all of the proffered evidence. The motion to strike is denied.

Report and Recommendation to which the objections are made, and set forth the basis for such objections. *See* Fed. R. Civ. P. 72; *Nix*, 897 F.2d at 357. Failure to timely file objections may constitute a waiver of a party's right to appeal questions of fact. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Nix*, 897 F.2d at 357.

IT IS SO ORDERED.

Dated this 21st day of April, 1997.

/s/ Ross A. Walters
ROSS A. WALTERS
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DANIEL WATKINS and CYNTHIA WATKINS,	:	NO. 4-93-CV-10487
Plaintiffs,	:	**REPORT & RECOMMENDATION PURSUANT TO 28 U.S.C. § 636(b)(1)(B)**
vs.	:	
TERRY LUNDELL and STEPHANIE LUNDELL,	:	(Filed Jun 11 94)
Defendants.	:	

I. INTRODUCTION AND BACKGROUND.

On July 1, 1993, Daniel and Cynthia Watkins filed a Complaint and Jury Demand in the United States District Court for the Southern District of Iowa alleging breach of contract and fraud arising out of a written contract entitled "Mutual Release and Settlement Agreement." The Mutual Release and Settlement Agreement set forth the terms of a settlement between Daniel and Cynthia Watkins and Terry and Stephanie Lundell arising out of a Complaint and Jury Demand filed by the Watkins against Terry Lundell on May 19, 1992 in the United States District Court for the Northern District of California. In that underlying litigation, the Watkins allege that Terry Lundell breached a contract and engaged in a variety of tortious conduct arising out of the Watkins' attempted purchase from Lundell of approximately 5,381 acres of farmland in Franklin and Butler Counties, Iowa.

On November 18, 1993, the Watkins filed a Motion for Entry of Default Judgment in this court. On November 23, 1993, pursuant to Federal Rule of Civil Procedure 55(a) , United States District Court Clerk, James R. Rosenbaum, entered a default against Terry and Stephanie Lundell. On December 2, 1993, pursuant to 28 U.S.C. § 636(b)(1)(B), United States District Court Judge Ronald E. Longstaff referred this matter to me for an evidentiary hearing, if necessary, and for the submission of a report and recommendation regarding the amount of judgment and attorney fees to be entered against Defendants. On December 15, 1993, I entered an order setting an evidentiary hearing for Friday, January 7, 1994 to determine the damages, if any, to which the Watkins were entitled. This matter was then heard on January 7, 1994. Robert K. DuPuy of LaMarca & Landry, P.C., West Des Moines, Iowa, appeared on behalf of the Plaintiffs. Plaintiff Daniel Watkins also personally appeared and testified at the evidentiary hearing.

At the evidentiary hearing in this matter, the Watkins also introduced and the court received into evidence the following exhibits:

Exhibit No.	Description
1	Iowa State Bar Association Real Estate Contract (Short Form) dated 05/13/90 in which Terry F. Lundell agreed to sell to Daniel R. Watkins 5,381 acres of farmland in Franklin and Butler Counties, Iowa

2	Complaint and Jury Demand styled Daniel Watkins and. Cynthia Watkins, Plaintiffs v. Terry Lundell, Defendant, No. C 92 20291-SW in the United States District Court for the Northern District of California
3	The Mutual Release and Settlement Agreement dated 12/21/92 resolving the Northern District of California litigation between the parties
4	Confession of Judgment in the Northern District of California litigation in the amount of $350,000.00 with Terry Lundell confessing judgment in favor of Daniel and Cynthia Watkins
5	Complaint and Jury Demand in this litigation
7	Affidavit of Daniel Watkins signed in January, 1994.

II. FACTUAL FINDINGS.

The Watkins and Terry Lundell resolved the Northern District of California federal litigation by entering into the Mutual Release and Settlement Agreement on December 21, 1992. While Stephanie Lundell, Terry Lundell's spouse, was not a party to the Northern District of California litigation, she did sign the Mutual Release and Settlement Agreement. As part of that agreement, Terry

and Stephanie Lundell agreed to pay Daniel and Cynthia Watkins a total of $335,000.00 as set forth below:

(a) $25,000.00 within ten (10) days of the execution of the Mutual Release and Settlement Agreement but in no event later than November 24, 1992;

(b) $70,000.00 on November 1, 1993 and delinquent if not received by November 5, 1993;

(c) $70,000.00 on November 1, 1994 and delinquent if not received by November 5, 1994; and

(d) a final payment of $70,000.00 on November 5, 1995.

Neither Terry nor Stephanie Lundell have paid one penny to Daniel and Cynthia Watkins pursuant to the December 21, 1992 Mutual Release and Settlement Agreement.

On August 28, 1993, Defendants Terry Lundell and Stephanie Lundell were personally served at 6602 North Pontatoc, Tucson, Arizona, 85718 with a copy of the Complaint and Jury Demand filed in this action on July 9, 1993. Neither Terry nor Stephanie Lundell entered an appearance, filed an answer, or in any other way responded to the Complaint filed by the Watkins. On November 18, 1993, the Watkins filed a Motion for Entry of Default Judgment in this court. On November 23, 1993, United States District Court Clerk, James R. Rosenbaum, pursuant to Federal Rule of Civil Procedure 55 (a), entered a default against Terry and Stephanie Lundell.

Based upon Plaintiffs' exhibits and the testimony of Daniel Watkins at the January 7, 1994 evidentiary hearing, the court finds that the factual allegations contained in the Complaint in the Northern District of California litigation concerning Terry Lundell's breach of agreement arising out of the real estate transaction involving 538 acres of land in Franklin and Butler Counties, Iowa are true. This court adopts the operative facts set forth in ¶¶ 5-33 of Plaintiffs' Complaint and Jury Demand in the Northern District of California. These facts are as follows:

5. On March 26, 1990, Defendant Terry Lundell purchased from A.C. and Neva Benton approximately 5,381 acres of farmland in Franklin and Butler Counties, Iowa, ("the farm property") on an installment sales contract (also herein referred to as "first contract") for a contract price of $6,000,000.00.

6. On March 26, 1990, Defendant Terry Lundell hired Donald Knudsen, Individually, and d/b/a Don Knudsen Realty, Inc. to manage the farm property for him in the coming agricultural season.

7. On information and belief, Defendant Lundell also retained Donald Knudsen d/b/a Don Knudsen Realty, Inc. to list the farm property and to seek buyers for the property.

8. Pursuant to this agency agreement Donald Knudsen d/b/a Don Knudsen Realty listed the farm property for sale and advertised it in newspapers in various areas of the United States, on behalf of Lundell.

9. Responding to one of these ads placed in the *San Francisco Chronicle*, Plaintiff Daniel Watkins contacted Defendant Lundell regarding the farm property on April 29, 1990.

10. On May 12, 1990, Knudsen showed Plaintiff Daniel Watkins the sites of the farm property in Iowa, and he also verbally gave Plaintiff information on a variety of items, including but not limited to, soil types, soil productivity, crop yield history, boundaries, drainage, tiling, fences, and income.

11. At the time of Plaintiff's visit to the farm property, Defendant Lundell and Knudsen were aware that Defendant Lundell would have difficulty meeting his obligations to Bentons under the first contract, but did not disclose these facts to Plaintiffs.

12. On May 13, 1990, Plaintiff Daniel Watkins and Defendant Terry Lundell entered into a real estate contract prepared by Knudsen. for the purchase of the subject farm property (herein also referred to as the "second contract"), for the contract price of $7,800,000.00 and requiring initial financing of $5,600,000.00 by a closing date of December 1, 1990.

13. In the second contract transaction, Donald Knudsen, d/b/a Don Knudsen Realty, Inc. acted as agent for both seller, Defendant Lundell, and buyers, Plaintiffs Watkins.

14. Neither Defendant Lundell nor Knudsen disclosed to Plaintiffs that Lundell had just purchased the property for $6,000,000.00,

despite the fact that they knew that arranging $5,600,000.00 of initial financing on such a contract would be impossible once lenders learned that the property had recently sold for $6,000,000.00.

15. Relevant and material to the Plaintiffs' entry into the second contract, Defendant Lundell made certain representations to Plaintiff Daniel Watkins regarding the financing of the transaction including, but not limited to:

    (a) Bentons would forgive $500,000.00 of principal and interest on their contract with Lundell; and

    (b) Part of the purchase price of the farm real estate was to be paid or set off by net farm income from the crops currently planted on the property.

16. Donald Knudsen, individually and in representative capacity as Don Knudsen Realty, Inc. made certain representations to Plaintiff Daniel Watkins, relevant and material to Watkins, entry into the second contract, including but not limited to:

    (a) That Lundell had marketable title to the farm property;

    (b) That the transfer of the farm property from Lundell to Watkins was legally and economically feasible; and

    (c) The farm property was being sold to Watkins at a price which made economically feasible the financing required by the second contract.

17. Plaintiffs relied on the truth of those representations.

18. Donald Knudsen and Defendant Terry Lundell were aware of the representations made by each other to Plaintiff Daniel Watkins and each gave Plaintiff assurances that the representations of the other were true.

19. Defendant Terry Lundell discussed with Plaintiffs various financing options and offered to assist in arranging a financing package by co-signing on the required loan, for example, to assure full and proper transfer of the farm real estate from Bentons to Lundell to Plaintiffs.

20. As a down payment on the second contract Plaintiff Daniel Watkins transferred to Defendant Terry Lundell, on May 14, 1990, title and possession of a 1985 Ferrari Testarossa valued at at least $200,000.00, the agreed upon down payment, which Defendant sold and invested the proceeds in another of his business enterprises.

21. The second contract provided that if the seller breached the contract, all payments made by the buyer were to be returned.

22. At the time of, and subsequent to the signing of the second contract, Defendant Terry Lundell advised Plaintiff Daniel Watkins not to publicly record the contract.

23. Following the second contract, Donald Knudsen d/b/a Don Knudsen Realty, Inc. continued to lit [sic] the farm property already sold on contract to Plaintiffs, as still for sale, and made on-going efforts to

find new buyers for the property, acting as the agent for Defendant Terry Lundell.

24. During the same time period, Donald Knudsen was actively involved in assisting Defendant Terry Lundell in raising funds necessary to meet his obligations under the Benton contract.

25. Plaintiffs were not informed by either Knudsen or Defendant Lundell of Lundell's financial difficulties, or of Knudsen's attempts to help Lundell honor his contract with Bentons.

26. In mid July, 1990, Defendant Lundell rejected Plaintiffs' attempts to negotiate a restructuring of the deal in order to make it economically feasible, including an offer by Plaintiffs to enter into a partnership with Lundell to work the farm together and share profits with the goal of refinancing the farm in a few years.

27. Approximately October 15, 1990, Defendant Lundell called Plaintiffs' home and told them "We have a deal," and to finalize on their financing; that he had persuaded Bentons to take a $1,000,000.00 second mortgage to complete the deal.

28. In reliance on the representations of Defendant, Plaintiffs paid a loan origination fee of $25,000.00, and an appraisal fee of $8,000.00 to begin the final arrangements for the purchase of the farm property on the second contract.

29. On or about January 15, 1991, Defendant Lundell assured Plaintiffs that the deal

would be consummated, and that appropriate financing arrangements with the Bentons had been structured.

30. On January 18, 1991, Benton instituted mediation proceedings and prepared forfeiture papers against Lundell on the March 26, 1990, contract between them.

31. On March 13, 1991, Benton sued Lundell for default on the real estate installment purchase contract, resulting in Defendant Lundell's loss of the farm property and his inability to transfer it to Plaintiffs under the second contract.

32. Despite repeated demands, Defendant Lundell has refused to return to Plaintiffs the down payment they made pursuant to the second contract for the purchase of the farm property.

33. Summary of Contracts.

1. Date: March 26, 1990

   Seller: Benton

   Buyer: Lundell

   Price: $6,000,000.00

   Terms: $400,000.00 down; balance, contract for deed.

2. Date: May 13 1990

   Seller: Lundell

   Buyer: Watkins

   Price: $7,800,000.00

Terms: $200,000.00 down; balance, contract for deed ($5,600,000.00 first mortgage)

Plaintiffs' Complaint and Jury Demand in the United States District Court for the Northern District of California, No. C92-20291 at 2-8 (May 19, 1992).

The Mutual Release and Settlement Agreement in the Northern District of California litigation, which is the subject matter of this litigation, required Defendants Terry and Stephanie Lundell to pay the Watkins $335,000.00 plus interest at five percent (5%) per annum. This total amount was to be secured by properties alleged to have sufficient equities to secure the amount of these payments. Additionally, Terry Lundell was obligated to take out a life insurance policy to cover the cost of these payments. Neither Terry nor Stephanie Lundell have made any payment pursuant to the Mutual Release and Settlement Agreement. Terry Lundell has failed to secure the required life insurance policy. The properties pledged by the Lundells as security have proven to be worthless and without sufficient equity to satisfy any part of the settlement amounts contained in the Mutual Release and Settlement Agreement.

III. DEFAULT JUDGMENT DAMAGES.

The court further finds that Daniel and Stephanie Watkins are entitled to Three Hundred Thirty-Fifty Thousand Dollars ($335,000.00) in actual damages plus interest at five percent (5%) per annum for Terry and Stephanie Lundell's breach of the Mutual Release and Settlement

Agreement and independent fraudulent and tortious conduct. The court specifically finds that the other compensatory damages sought by the Watkins, including all of their attorney fees for this litigation as well as the litigation in the Northern District of California are not recoverable because they are not proper elements of compensatory damages under the Mutual Release and Settlement Agreement.[1]

Terry and Stephanie Lundell entered into the Mutual Release and Settlement Agreement with no intention of fulfilling their portion of the agreement. Based upon the evidence in the record, the court concludes that the Lundells entered into and breached the Mutual Release and Settlement Agreement based upon fraudulent activity

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[1] Under Iowa law "[a]ttorney fees are generally not recoverable as damages in the absence of a statute or a provision in a written contract." *Suss v. Schammel*, 375 N.W.2d 252, 256 (Iowa 1985). While the Iowa Supreme Court has recognized an exception to the rule where defendants' conduct was "oppressive and tinctured with legal malice," *Kuiken v. Garrett*, 51 N.W. 2d 149, 158 (Iowa 1952) , the court does not believe it is appropriate to award attorney fees here in addition to the large punitive damages awarded. Even if an award of attorney fees would be appropriate under the recognized exception by the Iowa Supreme Court, the Watkins have failed to provide sufficiently detailed evidence regarding attorney fees arising out of the breach of the Mutual Release and Settlement Agreement. Rather, Daniel Watkins testified at the evidentiary hearing that he has incurred $50,000.00 in attorney fees. The court understood this testimony to include attorney fees for the action in the United States District Court for the Northern District of California. In the absence of a specific itemization for fees claimed in this litigation, fees are not recoverable. *Houghton v. Sipco, Inc.*, 828 F. Supp. 631, 643 (S.D. Iowa 1993).

which, therefore, constitutes independent, tortious actions and fraudulent activity independent of Terry and Stephanie Lundell's breach of the Mutual Release and Settlement Agreement.

The court further finds, by a preponderance of clear, convincing and satisfactory evidence that the fraudulent conduct of Defendants Terry Lundell and Stephanie Lundell constituted a willful and wanton disregard for the rights of Daniel and Cynthia Watkins and that conduct of Terry and Stephanie Lundell was directed specifically at Daniel and Cynthia Watkins within the meaning of Iowa Code § 668A.1(1)(a) & (b).

Daniel and Cynthia Watkins are entitled to an award of punitive damages due to the independent and fraudulent activity of Defendants Terry and Stephanie Lundell. *See Pogge v. Fullerton Lumber Co.*, 277 N.W.2d 916 (Iowa 1979). In considering the amount of punitive damages, this court has considered all of the evidence relating to the nature of Terry and Stephanie Lundell's conduct, the amount of punitive damage that will punish and discourage like conduct by the Defendants in view of their financial condition; and Plaintiffs' actual damages. *See* Uniform Jury Instruction 210.1; *Nassen v. National States Ins. Co.* , 494 N.W. 2d 231, 238 (Iowa 1992) ; *Larson v. Great West Casualty Co.*, 482 N.W. 2d 170, 174 (Iowa App. 1992) ; *Suss v. Schammel*, 375 N.W. 2d 252 (Iowa 1985) ; *Rowen v. Le Mars Mutual Ins. Co. of Iowa*, 282 N.W.2d 639, 661-62 (Iowa 1979) ; *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, No. 91-3717, slip op. at 4-14 (8th Cir. Dec. 28, 1993).

The court finds based on the testimony of Daniel Watkins, that Terry Lundell represented to Daniel Watkins that Terry Lundell's net worth was approximately $11,000,000.00.

The court finds that Daniel and Cynthia Watkins are entitled to an award of Three Million Five Hundred Thousand Dollars ($3,500,000.00) in punitive damages. Finally, the court finds that the conduct of Terry and Stephanie Lundell constitutes false pretenses, false representations, actual fraud and the use of a statement in writing that was materially false regarding the Lundells' financial condition upon which representation the Watkins reasonably relied in entering into the settlement agreement, and that the Lundells made or published the false statements with intent to deceive the Watkins within the meaning of 11 U.S.C. 523(a)(2)(A) and (B)(i)-(iv).

IV. CONCLUSION.

The court finds that Daniel and Cynthia Watkins are entitled to Three Hundred Thirty-Five Thousand Dollars ($335,000.00) plus interest at the rate of five percent (5%) per annum in actual damages for Terry and Stephanie Lundell's breach of the Mutual Release and Settlement Agreement. Additionally, the court finds that Daniel and Cynthia Watkins are entitled to an award of Three Million Five Hundred Thousand Dollars ($3,500,000.00) in punitive damages. The court respectfully recommends that judgment be entered in accordance with these findings.

IT IS ORDERED that the parties shall have ten (10) days after service of a copy of the report and recommendation to file written objections, pursuant to 28 U.S.C.

§ 636(b)(1), unless an extension of time for good cause is obtained. *See Fed. R. Civ. P.* 72 ; *Thompson v. Nix*, 897 F.2d 356, 357 (8th Cir. 1990). Such extensions will be freely granted. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. Failure to timely file objections may constitute a waiver of a party's right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140 (1985); *Nix*, 897 F. 2d at 357.

IT IS SO ORDERED.

DATED this 11th day of January, 1994.

/s/ Mark W. Bennett
MARK W. BENNETT
UNITED STATES
MAGISTRATE JUDGE

Supreme Court, U.S.
FILED
SEP 7 1999
OFFICE OF THE CLERK

No. 99-107

In The

Supreme Court of the United States

TERRY LUNDELL,

Petitioner,

vs.

DANIEL WATKINS and CYNTHIA WATKINS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

DENNY M. DENNIS
Counsel of Record
BRADSHAW, FOWLER, PROCTOR
& FAIRGRAVE, P.C.
801 Grand Avenue, Suite 3700
Des Moines, IA 50309-2727
(515) 243-4191

Counsel for Respondents
Daniel Watkins and Cynthia Watkins

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

Petitioner requests review of the Eighth Circuit's opinion affirming in part and reversing in part a decision denying relief from a default judgment under Federal Rule of Civil Procedure 60(b)(6). The underlying district court decision appealed to the Eighth Circuit awarded actual damages in the amount of $235,000.00 against Petitioner, Terry Lundell, and his wife, Stephanie Lundell. The district court awarded punitive damages in the amount of $3,500,000.00 against the Petitioner, Terry Lundell, and $117,500.00 in punitive damages against Petitioner's wife, Stephanie Lundell. The Eighth Circuit affirmed the award of actual damages against the Petitioner and his wife, but reversed the award of punitive damages by reducing the amount awarded against the Petitioner from $3,500,000.00 to $940,000.00. In addition, the Eighth Circuit eliminated the punitive damages awarded against the Petitioner's wife, Stephanie Lundell.

Following the Eighth Circuit's decision, the District Court entered judgment accordingly in favor of Respondents and against Petitioner for actual damages in the amount of $235,000.00 and punitive damages in the amount of $940,000.00. Thereafter, Petitioner filed a Petition for Writ of Certiorari requesting review by this Court.

REASONS FOR DENYING THE WRIT

There is no cause for this Court's review of the Eighth Circuit's decision because the petition is fundamentally flawed in several respects. First, Petitioner has

presented questions for review which are neither timely, nor in any way supported by the arguments offered as reasons to grant a writ. Second, the questions presented and arguments offered do not identify any conflict among either the United States courts of appeals or the federal district courts. Third, the questions presented and arguments offered do not identify an important federal question that has been improperly decided or otherwise warranting this Court's attention. Given these deficiencies, certiorari is not warranted on the grounds offered by the Petitioner.

A. The Questions Presented for Review and the Arguments Offered in Support Fail to Raise a Justiciable Issue or Apprise the Court and Respondent of the Specific Claims Advanced by the Petitioner.

Under Supreme Court Rule 14.1(a), a petitioner is required to include in the petition "the questions presented for review, expressed concisely in relation to the circumstances of the case, without unnecessary detail." Furthermore, "any question presented is deemed to comprise every subsidiary question fairly included therein. Only the questions as set out in the Petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14.1(a). The purpose of requiring a statement of the questions presented is to apprise the Court and the respondent of the issues to be reviewed. *See generally,* R. Stern et al., *Supreme Court Practice* § 6.26 (6th ed. 1986).

In the instant case, the questions presented for review are unclear and fail to apprise the Court and Respondent of the claims advanced. As stated in the

Petition, the questions presented are limited in scope to technical challenges under the Soldiers' and Sailors' Civil Relief Act of 1940 as codified at 50 U.S.C.S. Appx. §§ 520-21 (1996). Despite the limited scope of the questions presented, Petitioner has set forth various tangential supporting arguments which are unrelated and fail to address the grounds on which Petitioner seeks relief. It should be noted that the arguments enumerated by Petitioner in support of the questions presented are taken verbatim from the reply brief submitted by Petitioner in his appeal to the Eighth Circuit. With the exception of the argument challenging the punitive damage award, each of the arguments set forth by the Petitioner were found to be without merit by the Eighth Circuit. (Pet. for Cert. App. 7-8).

Although this Court has permitted exceptions to Supreme Court Rule 14.1(a) to consider issues beyond those contained in the questions presented, the arguments set forth in points I, II, and IV-X of the Petition do not properly advance claims in support, nor can the issues they raise be deemed "fairly included" therein. *See, e.g., Lebron v. National R.R. Passenger Corp.,* 513 U.S. 374, 379-383 (1995); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27, 30-34 (1993); *Yee v. City of Escondido*, 503 U.S. 519, 535-36 (1992). Only the argument in point III of the Petition remotely concerns the federal statute providing the basis for the questions presented. (Pet. for Cert. App. 11-12). As will be discussed more fully in Part B below, even this argument fails to apprise either the Respondent or the Court of the requisite basis for obtaining review by this Court.

In declining to consider particular claims advanced in an accused's brief under provisions preceding Supreme Court Rule 14, authorities observing this Court's decisions have commented that "the failure of a petition to present with accuracy, brevity and clarity whatever is essential to a ready and adequate understanding of the points requiring consideration is a sufficient reason for denying the petition." Gary Knapp, Annotation, *Supreme Court's Construction and Application of Supreme Court Rule 14 (and Similar Predecessor Provisions), Prescribing Requirements of Petition for Certiorari,* 118 L. Ed. 2d 665 (1997) (*citing Garner v. United States,* 424 U.S. 648, 656 (1976); *Haner v. United States,* 440 U.S. 1308, 1310 (1979)). Given the deficiencies of the Petition in clearly setting forth questions for review and arguments in support, the Court should deny the Petition for a Writ of Certiorari.

B. The Questions Presented by the Petitioner Were Not Timely Raised and Are Not Supported by the Clear Language of the Soldiers' and Sailors' Civil Relief Act of 1940.

Petitioner presents for the Court's review questions concerning the application of the Soldiers' and Sailors' Civil Relief Act of 1940 ("the Act") codified at 50 U.S.C.S. Appx. §§ 520-21 (1996). Specifically, Petitioner contends the Eighth Circuit Court of Appeals erred by (1) not setting aside the default judgment rendered against him based on Respondent's failure to file an affidavit attesting that Petitioner was not in the military service, and (2) by not requiring the Respondent to file a bond to indemnify

Petitioner against the judgment should the judgment later be set aside as specified in Section 520(1) of the Act.

Both of the questions presented are untimely and not properly before the Court. The sufficiency of the affidavit filed with the district court and its effect on the Petitioner's ability to obtain relief from the default judgment were raised by the Petitioner and addressed by the district court following the hearing on Petitioner's combined motions to set aside the default judgment. (Pet. for Cert. Appx. 30-34). Although the district court recognized the affidavit was insufficient under Section 520(1) of the Act, this violation was of insufficient gravity and merely made the default judgment voidable, not void. (Pet. for Cert. App. 32); *see, e.g., United States v. Hampshire*, 892 F. Supp. 1327, 1332-33 (D. Kan. 1995), *aff'd* 95 F.3d 999 (10th Cir. 1996), *cert. denied* 519 U.S. 1084 (1997); *Davidson v. General Fin. Corp.*, 295 F. Supp. 878, 881 (N.D. Ga. 1968). Additional elements necessary to obtain relief under the Act (i.e. timeliness, active duty in the military and prejudice) were not shown by the Petitioner. Consequently, the district court denied Petitioner relief from the default judgment. The district court's decision in this regard was never raised by the Petitioner in his appeal to the Eighth Circuit. As a result, it has not been preserved for consideration by this Court.

The second question presented, concerning posting of a bond by the Respondents, was never raised by the Petitioner before either the district court or the Eighth Circuit. Consequently, because this second question is presented for the first time in the Petition, it is not properly before the Court and should not be considered.

See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 456-57 (1995).

Notwithstanding the failure of Petitioner to preserve error, the arguments offered in support of the questions presented fail to set forth Petitioner's rationale for why these questions should be considered by the Court. As noted above, only point III in the Petition even remotely discusses the application of the Act. This argument merely addresses whether the Act applies and does not consider either of the questions presented. In addition to these inherent defects, the Petitioner's reliance upon the Act for relief is without merit because Petitioner did not apply for relief from the default judgment within the time prescribed under the Act, nor does the Act substantively apply to provide relief.

1. Petitioner Did Not Timely Apply to the District Court to Obtain Relief From the Default Judgment Pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940.

For ease of reference and to avoid repetition, Respondents respectfully refer the Court to the factual and procedural background set forth in the report and recommendation of United States Magistrate Judge Ross A. Walters attached as Appendix "C", pages 20-26 to the Petition.

In order to obtain relief from a judgment under the Act, Petitioner was required to apply to the district court not later than ninety (90) days after the termination of any military service. 50 U.S.C.S. Appx. § 520(4) (1996); *Hampshire*, 892 F. Supp. at 1332 ("[E]ven if judgment

failed to comply with [a] requirement of the Act, the judgment is valid if the affected serviceman fails to have the judgment vacated pursuant to subsection (4)"). In the instant case, the default judgment was entered against Petitioner on January 16, 1994. The district court found that any relevant military duty of the Petitioner ended February 16, 1994. (Pet. for Cert. App. 30-31). However, it was not until July 6, 1995, well over one year following any military service, that Petitioner moved to set aside the default judgment. (Pet. for Cert. App. 4). This was well beyond the ninety (90) day deadline to file an application for relief. As noted by the district court, Petitioner knew during this entire period that he was in default and that a judgment could be entered against him. However, he took no action to protect any rights he may have had under the Act. (Pet. for Cert. App. 33). On this basis, any relief Petitioner wishes to obtain from this Court pursuant to the Act is time-barred.

2. The Soldiers' and Sailors' Civil Relief Act of 1940 Does Not Apply to the Petitioner.

Notwithstanding the lack of a timely application for relief, the substantive language of the Act would not afford the protection Petitioner seeks. To set aside the default judgment under the Act, Petitioner is required to show (1) he was on active duty in the military service of the United States at the time default judgment was entered, (2) he had a meritorious or legal defense to the action, and (3) he was prejudiced as a result of his military service. 50 U.S.C.S. Appx. §§ 510-11, 520(4); *LaMar v. LaMar*, 505 P.2d 566, 568-69 (Ariz. Ct. App. 1973); *Krumme v. Krumme*, 636 P.2d 814, 817 (Kan. Ct. App. 1981); *Snapp v.*

Scott, 167 P.2d 870, 873 (Okla. 1946); *Ostrowski v. Pethick*, 590 A.2d 1290, 1292 (Pa. Super. Ct. 1991); *Flynn v. Great Atl. Management Co.*, 431 S.E.2d 327, 329 (Va. 1993). It was concluded by the district court that the Act did not apply to provide relief. (Pet. for Cert. App. 30-34). On appeal, the Eighth Circuit did not even consider the issue, finding the argument to be without merit on its face. (Pet. for Cert. App. 8).

A prerequisite to setting aside the default judgment under Section 520(4) of the Act, is that the judgment be rendered while the Petitioner was a "person in military service during the period of such service or within thirty days thereafter." Under the Act, "person in the military service of the United States" includes:

> All members of the Army of the United States, the United States Navy, the Marine Corps, the Air Force, the Coast Guard, and all officers of the Public Health Service detailed by proper authority for duty either with the Army or Navy. *The term "military service", as used in this Act, shall signify Federal service on active duty with any branch of service heretofore referred to or mentioned* as well as training or education under supervisions of the United States preliminary to induction into military service. The terms "active service" or "active duty" shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave, or other lawful cause.

50 U.S.C.S. Appx. § 511(1) (1996) (citations omitted and emphasis added). On its face, the Act is intended to reach and protect military personnel on "active duty." *See, e.g., Conroy v. Aniskoff*, 507 U.S. 511, 515 (1993); *Hampshire*, 95

F.3d at 1005, *Betha v. Martin*, 188 F. Supp. 133, 134-35 (E.D. Pa. 1960); *Driver v. Driver*, 416 A.2d 705, 706 (Conn. Super. Ct. 1980); *Lang v. Lang*, 25 N.Y.S.2d 775, 776 (Sup. Ct. 1941).

Petitioner was not on continuous active duty in the military service of the United States at the time the default judgment was entered against him. Between service of the Summons and Complaint on August 28, 1993, and the entry of default on November 23, 1993, Petitioner was engaged in some type of military activity on thirty-six days. (Pet. for Cert. App. 30). Between November 23, 1995, and the entry of judgment on February 16, 1994, Petitioner was involved with the military on thirty-three days. (Pet. for Cert. App. 30). Duty codes reviewed by the district court were unclear regarding the Petitioner's exact duty status. Giving the Petitioner the benefit of the doubt, the district court found that periodically during the relevant time Petitioner was on active duty with his unit the longest period of which was ten days. (Pet. for Cert. App. 30-31). Clearly, the time spent in the military service was insufficient to satisfy this first element.

Even assuming, as did the district court, that the first element is satisfied, Petitioner fails to demonstrate that the additional elements are satisfied. Neither the existence of a meritorious defense nor proof of prejudice have been shown. Petitioner's testimony at the time of the hearing on the combined motions to set aside default clearly indicates that he was not prejudiced by his military service. The district court's decision in this regard is informative:

> Though he worked frequently at his military job, most of the time he was not on active duty during the relevant period. He was not deployed for an extended period far from his home. He contacted an Iowa attorney to represent him (indeed, while on duty) but did not follow through with the information requested. He retained an Arizona attorney to attempt to negotiate with plaintiffs. He had appeared, defended and was prosecuting a counterclaim in the separate, related action in this court. He was carrying on his extensive farming business. He admitted that his military status did not prevent him from attending to his business or defending this action. As the Court has found, Mr. Lundell made a conscious decision not to defend this action.

(Pet. for Cert. App. 33-34) (citations omitted). Absent a showing of prejudice, Petitioner was not entitled to the protections of the Act. *See, e.g., Swartz v. Swartz,* 412 So. 2d 461, 462 (Fla. Ct. App. 1982) (default judgment against serviceman held proper where serviceman failed to appear; serviceman's rights were not prejudiced as a result of his military service, but from his own intentional and informed actions); *Burgess v. Burgess,* 234 N.Y.S.2d 87, 89 (Sup. Ct. 1962) (the Act was not intended to prevent judgment against a person in military service who was fully informed of the pendency of the action and had adequate time and opportunity to appear and defend or otherwise protect his right). The factual findings made by the district court coupled with the clear language of the Act on the various elements necessary to obtain relief dictate that a writ be denied.

C. Petitioner Has Not Identified a Conflict Among Lower Courts or an Important Federal Question Requiring This Court's Review.

This Court may grant a writ of certiorari for various reasons. However, two of the principal considerations governing the exercise of this Court's discretion to grant certiorari are (1) whether a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter, or (2) whether a United States court of appeals has decided an important question of federal law that has not been settled by this Court or decided an important federal question in a way that conflicts with relevant decisions of this Court. Sup. Ct. Rules 10(a) and (c).

Neither of these considerations are raised or addressed in the Petition. First, Petitioner has not identified an intolerable conflict, let alone any conflict, between the decision of the Eighth Circuit and the lower courts on the interpretation or application of the Soldiers' and Sailors' Civil Relief Act of 1940 in the context of the questions presented. Furthermore, the numerous tangential arguments set forth by the Petitioner on various unrelated issues fail to identify conflicts deserving of resolution by this Court.

Second, the Petitioner has not identified an important question of federal law warranting review by this Court. In this case, the application of the Soldiers' and Sailors' Civil Relief Act of 1940, as well as the litany of additional arguments set forth by the Petitioner, are bound by the specific facts of this case. Any injustice stemming from

the errors alleged by the Petitioner turns on the application of existing law to the specific facts of this case and does not concern broader issues of public policy or violations of constitutional protections which may sometimes provide a basis for the Court's review.

In this case, the lower courts made every possible effort to ensure that the Petitioner's rights were protected. Before default was entered, the district court requested the report and recommendation of United States Magistrate Mark W. Bennett. Subsequently, when the Petitioner moved to set aside the default judgment, the district court requested a report and recommendation by United States Magistrate Ross A. Walters. Each of these reports and recommendations were adopted by United States District Court Judge Ronald E. Longstaff. Finally, the Eighth Circuit Court of Appeals reviewed the lower court decisions and upheld the judgment rendered against the Petitioner, but reduced the amount of punitive damages assessed following full consideration of the facts and analysis of this Court's recent precedent. (Pet. for Cert. App. 7-15); *see, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). In fact, Judge Morris Sheppard Arnold dissented, stating that Petitioner was not entitled to relief and that the punitive damage award was proper under this Court's recent decisions. (Pet. for Cert. App. 15-16).

In sum, Petitioner has failed to provide any basis for this Court to exercise its discretion to grant certiorari. There has been no identification of a conflict, no error in interpretation or application of a federal statute and no

broader purpose necessitating consideration of the Petitioner's claims by this Court. As a result, a writ of certiorari should be denied.

CONCLUSION

For the reasons set forth in this Brief, this Court should deny the Petition for Writ of Certiorari as requested.

Respectfully submitted,

DENNY M. DENNIS
BRADSHAW, FOWLER, PROCTOR
& FAIRGRAVE, P.C.
801 Grand Avenue, Suite 3700
Des Moines, IA 50309-2727
(515) 243-4191

(3)

Supreme Court, U.S.
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No. 99-107

In The

Supreme Court of the United States

TERRY LUNDELL,

Petitioner,

vs.

DANIEL WATKINS and CYNTHIA WATKINS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

TERRY LUNDELL
8715 E. Eagle Creek Drive
Tucson, Arizona 85730
(520) 296-5486

Petitioner Pro Se

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

Petitioner requests review of the Eighth Circuit's opinion affirming in part and reversing in part a decision denying relief from a default judgment under Federal Rule of Civil Procedure 60(b)(6). The underlying district court decision appealed to the Eighth Circuit awarded actual damages in the amount of $235,000.00 against Petitioner, Terry Lundell, and his wife, Stephanie Lundell. The district court awarded punitive damages in the amount of $3,500,000.00 against the Petitioner, Terry Lundell, and $117,500.00 against his wife Stephanie Lundell. At the time of the entry of the default judgment, November 18, 1993, Petitioner Terry Lundell was in active military duty and continued with such duty until January 2, 1998. The Default Judgment was redocketed as a Motion for Judgment on November 23, 1993 (Clerk's Pleading Index Entry #4).

On December 2, 1993, U.S. District Judge Ronald E. Longstaff referred the case to U.S. Magistrate Mark W. Bennett for recommendations. (Clerk's Pleading Index Entry #5). On December 15, 1993, Magistrate Bennett entered an order directing that an evidentiary hearing be held on Appellees' Motion for Judgment on January 7, 1994 at 9:00 AM. (Evidentiary Hearing) (App. at 141). Said order was stamped "Copy to Counsel" and initialed by the Court. Id. Said order does not indicate that a copy was served or mailed to Appellants. Id. Appellants were without counsel at the time the order for the Evidentiary Hearing was entered and were without knowledge of the hearing. On January 7, 1994 the Evidentiary Hearing was held in U.S. District Court. Appellants did not appear and were not represented at the hearing by counsel.

On July 6, 1995, Appellants filed a Motion to Set Aside Default Judgment, for Bill of Review in Equity and for Relief under the Soldiers' and Sailors' Relief Act (combined motion) (App. at 54-69). On April 21, 1997,

U.S. Magistrate Ross Walters filed a report and recommendation to Judge Longstaff concerning the combined motion (Second Report). (App. at 181-206). The result of this report was that the Court affirmed the award of actual damages against the Petitioner and his wife but reversed the award of punitive damages by reducing the amount against the Petitioner from $3,500,000.00 to $940,000.00 and eliminating the punitive damages against the Petitioner's wife. Following this order, Petitioners filed a Motion to Amend Findings of Fact and Judgment and Brief in support thereof. On August 21, 1997, Appellees resisted the Petitioners Motion although the Petitioners were never served with notice of said resistance. On August 29, 1997, Judge Longstaff over-ruled the Petitioners Motion to Amend Findings of Fact and Judgment. Thereafter, Petitioners filed said Notice of Appeal before this Court.

REASONS FOR GRANTING THE WRIT

THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940 APPLIES DIRECTLY TO THE PETITIONER

It has been established that between the date of service of the Summons and Complaint on August 28, and the entry of default on November 23, the Petitioner was engaged in military activity. See Exhibits 3, 12. Between November 23 and the entry of Judgment on February 16, 1994 the Petitioner was also involved in military activity. The Petitioners military activity officially ended on January 2, 1998. The United States District Court for the Southern District of Iowa Central Division found that "while for most of the entries of his duty status is unclear . . . (*See* Exhibit 3.) . . . giving Mr. Lundell the benefit of the doubt, the most the record indicates is that periodically during the relevant time period he was on active duty with his unit the longest period of which was

ten days". While this may be true, it is important to remember that there were many "periods" of duty during the relevant time periods.

The Soldiers' and Sailors' Relief Act of 1940 provides in part:

> 1) In any action or proceeding commenced in any court, if there shall be a default or any appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. 50 U.S.C. App. 520(1).

If the defendant is ***in military service*** (emphasis added), no default judgment is to be entered except upon court order following appointment of an attorney to represent the defendant, and the court may require a bond to indemnify the defendant from loss should the judgment later be set aside. Id. The term "military service" is defined as "Federal service on active duty with any branch" of the Armed Forces. 50 U.S.C. App. 511(1). The District Court found that Terry Lundell was in "military service" at the time of the entering of the default judgment. (Pet. App. 33.)

While the affidavit of Mr. DuPuy in support of the motion for entry of default judgment averred that the defendants were not "infants or incompetent persons, nor were they under any other legal disability within the meaning of Fed. R. Civ. P. 55(b)(1) or (2)," the affidavit did not allege, or set forth facts showing that the defendants were not in military service (or that Mr. Lundell was), and accordingly was insufficient. While a violation of the statute renders a judgment voidable and not void, *see Davidson v. General Finance Corp.*, 295 F. Supp. 878, 881 (Dist. Ga. 1968), *Ostrowski v. Pethick*, 404 Pa. Super. 392, 590 A.2d 1290, 1294 (1991), *Krumme v. Krumme*, 6 Kan. App.2d 939, 636 P.2d 814, 817 (1991), Plaintiff asserts that this affidavit amounts to a fraud on the Court. *See Hadges*

v. Yonkers Racing Corp., 48 F.3d 1320, 1325 (2nd Cir. 1995). Mr. DuPuy testified that he had researched the issue and "concluded" that the Soldiers' and Sailors' Relief Act applied to full time or active members of the military and that Lundell was not under a disability by reason of that act since he "concluded" that Lundell was only a "part-time" Air Force pilot. The Court found that this "explanation" coupled with the ambiguities concerning Lundell's duty status was against any finding of fraud. This finding flies in the face of justice. If DuPuy "researched" the issue and "concluded" that Lundell was not in military service at the time of the filing of the default judgment, being fully aware of the requirements of the affidavit since he "researched" it, the affidavit should have properly set forth the facts that the defendants were not in military service. On the contrary and clearly fraudulently, the required reference to military service was completely omitted. There can be no explanation for this omission other than a perpetration of fraud on the court. The Court, while finding that Lundell was involved in military service during the period of time between the serving of the summons and complaint and the entering of the default judgment, while at the same time was apprised of the fact that DuPuy had "researched" the issue and unilaterally "concluded" that Lundell was only part-time and therefore, not in military service as defined by the act erred by not voiding the judgment.

The insufficiency of the affidavit was purposely deceiving and of enormous gravity and thus the entry of the Default Judgment was fatally flawed at its inception and the failure of the Court to void the Default Judgment was clearly erroneous and constituted reversible error.

Section 501 et seq. of this Appendix was intended solely for the benefit of those in the armed services of the United States, and is to be liberally construed to effectuate its purpose. *Oliver v. Oliver*, 12 So.2d 852, 244 Ala. 234

(1943). One of the purposes of this section is to prevent default judgments from being entered against members of the armed services in circumstances where they might be unable to appear and defend themselves. *U.S. v. Kaufman,* 453 F.2d 306 (2d Cir. 1971). The (Act) is also designed to be construed liberally to prevent injury to their civil rights during their term of service arising from judicial proceedings. *See Kirby v. Holman,* 25 N.W.2d 664, 238 Iowa 335 (Iowa 1947). The requirements of the affidavit provision of the Soldiers' and Sailors' Relief Act of 1940 (50 U.S.C.A. App. § 520(1)) are *mandatory* (emphasis added), and restrict the court's power to render a default judgment until they have been met. *Akers v. Bonifasi,* 629 F. Supp. 1212 (M.D. Tenn. 1984).

PETITIONER DID TIMELY APPLY TO THE DISTRICT COURT TO OBTAIN RELIEF FROM THE DEFAULT JUDGMENT PURSUANT TO THE SOLDIERS' AND SAILORS' RELIEF ACT OF 1940.

50 U.S.C. § 520(4) provides, in pertinent part:

> If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal representative be let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof.

The Petitioner filed his Motion to Set Aside Default Judgment, for Bill or Review in Equity and for Relief

under the Soldiers' and Sailors' Relief Act (combined Motion) (App. at 54-69) on July 6, 1995. His last official day of service was January 2, 1998. The filing of his petition was well before the time limits set forth in 50 U.S.C. § 520(4). While his active duty was not continuous, there was never a period of 90 days during which he was not in active duty. Appellees side stepped this issue by admitting that although Lundell was involved in military duty up until January 2, 1998, he was to have been considered in the United States for a period of 90 days. The fact is that Lundell was flying outside the United States on numerous occasions.

Appellees contended that since Lundell never "landed" in those foreign countries, he was considered to be in the United States which contention is ludicrous. Certainly justice does not demand that Lundell prepare and defend himself while flying refueling missions, risking his life for his country, but the Court unbelievably and unjustly concurred that since Lundell did not physically "land" the aircraft he was flying in those foreign countries, he was not "in" those foreign countries during the time periods in question.

EVEN SHOULD IT BE DETERMINED THAT THE PETITIONER UNTIMELY FILED HIS MOTION TO THE DISTRICT COURT TO OBTAIN RELIEF FROM THE DEFAULT JUDGMENT PURSUANT TO THE SOLDIERS' AND SAILORS' RELIEF ACT OF 1940, THIS UNTIMELINESS DOES NOT NECESSARILY PRECLUDE VOIDING OF THAT JUDGMENT.

While since the Default Judgment was fatally flawed at its inception, the untimeliness of the filing of the Application to Obtain Relief from the Default Judgment Pursuant to the Soldiers' and Sailors' Relief Act of 1940 should have been moot, Motion for entry of a default judgment is addressed to sound discretion of trial court. Fed. Rules Civ. Proc. rules 55(c), 60(b), 28 U.S.C.A., *See*

Albert Levine Associates, Inc. v. Denny Kershner, 45 F.R.D. 450 No. 68 Civ. 113 (1968). Under Rule 55(c), if an defendant's answer is filed late, the Court for good cause shown may set aside an entry of default and, if a judgment by default had been entered, may likewise set it aside in accordance with Rule 60(b). As a result of the actions of the Courts, his service in the military, the insufficient affidavit, the non-notice of the evidentiary hearing, the Lundells were unable to file an answer and can show good cause for the untimeliness of their application to the Court to obtain relief from the Default Judgment pursuant to the Soldiers' and Sailors' Relief Act, one good cause being the continued military service of Mr. Lundell, which service was sensitive and of a higher level of military clearance.

THE LUNDELLS WERE PREJUDICED BY REASON OF MR. LUNDELLS' MILITARY SERVICE IN MAKING HIS DEFENSE THERETO.

The fact that Mr. Lundell was in active military service during the time period between the service of the Summons and Complaint and the entry of the Default Judgment precluded Mr. Lundell from defending himself and his spouse. It has been established by the removal of the punitive damages against Stephanie Lundell that she had no knowledge of the proceedings or circumstances surrounding the action. She would have been unable to consult with counsel since she was unknowledgeable regarding the circumstances. Her only involvement was signing at the request of her husband a settlement agreement. As a result of Lundell being unable to defend, the judgment was entered and as a direct result of unilateral and unproved testimony of the Plaintiffs, exorbitant punitive damages were awarded against Lundell without him ever being able to offer a defense or true and accurate statements of his worth.

As a result of unsubstantiated statements by the Plaintiff advising the Court that the Lundells were worth "millions of dollars", and unsubstantiated statements by the Plaintiffs describing the actions of Mr. Lundell which were presented by the Defendants as heinous without Mr. Lundell having the opportunity to defend himself or rebut those statements, the excessive punitive damages were awarded.

Plaintiffs have made much of the fact that Mr. Lundell was able to make contact with an attorney and carry on some of his personal business and was aware of the pendancy of the Complaint and the Default Judgment. However, the fact that Mr. Lundell was able to manage some necessities vital to the support of his family and was able to find some time to attempt a defense does not mean that his military service which was vital to our country, numerous and by necessity largely unscheduled due to its sensitive nature allowed him to devote even the remotest amount of time necessary to properly defend himself against such a complicated complaint. Additionally, the security nature of his activities which resulted in his duty status to be related to the Court as "unclear" prejudiced Lundell in that this "unclearness" was interpreted by the Court that Mr. Lundell's military service was of minor nature with only occasional duty.

THE LUNDELLS HAD A MERITORIOUS DEFENSE

While never allowed to present it, the Defendants did have a meritorious defense to the charges which in order to preserve justice should have been allowed to be presented at trial. The Lundells were never afforded the opportunity to defend themselves because Mr. Lundell was serving his country.

THE PETITIONER HAS IDENTIFIED A CONFLICT AMONG LOWER COURTS, REVERSIBLE ERROR AND AN IMPORTANT FEDERAL QUESTION REQUIRING THIS COURT'S REVIEW, AND THE ARGUMENTS OFFERED IN SUPPORT DO RAISE A JUSTICIABLE ISSUE AND APPRISE THE COURT AND THE RESPONDENT OF THE SPECIFIC CLAIMS ADVANCED BY THE PETITIONER.

The Petitioner has clearly set forth the question for review, admittedly there are more than one. However, the most important one which has been identified is that the original Application for Default Judgment was fatally flawed in that the statement regarding military service was purposefully omitted. The Court improperly decided that this omission did not constitute fraud upon the Court.

The Lundells were improperly not noticed of the Evidentiary Hearing and were therefore not in attendance, had no counsel to represent them and were grievously prejudiced by the judgment and the punitive damages awarded against them.

The Soldiers' and Sailors' Relief Act was enacted to protect those in service of their country from default judgments being entered against them while they were unable to defend themselves while in the service of their country. Justice is not served when a Plaintiff is allowed to "research" whether or not the Defendant is covered by the act and if they conclude he is not, completely omit any reference to that service in their affidavit.

DuPuy admitted that he "referenced" the matter and therefore was clearly aware of the requirement, and it is unjust to allow the omission. On this premise, all affidavits may be omitted if a Plaintiff "researches" the matter and "concludes" that the Defendant is not an infant or incompetent person or under any other legal disability within the meaning of Fed. R. Civ. P. 55(b)(1) or 2, or "is" or "is not" actively involved in the military. Allowing the

decision of the United States District Court For The Southern District of Iowa, Central Division to stand that the "omission of the affidavit which did not allege, or set forth facts showing that the Defendants were not in military service (or that they were), did not void the Default Judgment" sets a dangerous precedent. According to that decision, any Plaintiff can at will omit the portion of the affidavit that refers to military service and the men and women serving our country will then be forced to incur legal expenses, time, effort and frustration to prove to the Court that they were in fact in military service, a luxury few of those in the service of our country can afford. Allowing that decision to stand reduces the Soldiers' and Sailors' Relief Act to a meaningless farce. Therefore, this Motion presents a question of grave importance to all of the men and women in the active service of their country and denial of its hearing would be a grave injustice.

CONCLUSION

For the reasons set forth in this Brief and the Writ of Certiorari filed on July 15, 1999, this Court should grant the Petition for Writ of Certiorari as requested.

Respectfully submitted,

TERRY LUNDELL

DATE: September 23, 1999